Supreme Court, U. S.
FILED
NOV 15 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-674

THIRD NATIONAL BANK IN NASHVILLE, *Petitioner*,

vs.

IMPAC LIMITED, INC., F. MURRAY PARKER and JAMES K. WALL, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

THOMAS P. KANADAY, JR.
FARRIS, EVANS & WARFIELD
18th Floor
Third National Bank Building
Nashville, Tennessee 37219
Counsel for Petitioner

Of Counsel:
STEPHEN W. RAMP
FARRIS, EVANS & WARFIELD
18th Floor
Third National Bank Building
Nashville, Tennessee 37219

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

INDEX

Opinions Below 1

Jurisdiction 2

Question Presented 2

Statute Involved 2

Statement of the Case 3

Reasons for Granting the Writ 5

Conclusion 13

Appendix A—Opinion of the Supreme Court of Tennessee A1

Appendix B—Order of the Chancery Court Granting the Preliminary Injunction A12

Appendix C—Memorandum and Order of the Chancery Court of Davidson County, Tennessee Dissolving the Preliminary Injunction and Permitting an Interlocutory Appeal Therefrom A10

Authorities Cited

Statutes

12 U.S.C. § 91 (1970) 2, 5, 8, 9, 10, 11, 12, 13

Act of June 3, 1864, Ch. 106, § 57, 13 Stat. 116 6

Act of March 3, 1873, Ch. 269, § 2, 17 Stat. 603 6

Act of February 18, 1875, Ch. 80, 18 Stat. 320 6

Table of Cases

Earle v. *Pennsylvania*, 178 U.S. 449 (1900) 11

Evans v. *Abney*, 396 U.S. 435 (1970) 12

McClain v. *C.I.R.*, 311 U.S. 527 (1941) 12

Pacific National Bank of Boston v. *Mixter*, 124 U.S. 721 (1888) 2, 7, 8
Van Reed v. *Peoples National Bank*, 198 U.S. 554 (1905) 7, 8
First National Bank of Oakland v. *Superior Court*, 240 Cal. App. 2d 109, 49 Cal. Rptr. 358, *cert. denied* 383 U.S. 829 (1966) 9
Freeman Mfg. Co. v. *National Bank of Boston*, 160 Mass. 398, 35 N.E. 865 (1894) 10
Kemple v. *Security First National Bank of Los Angeles*, 57 Cal. Rptr. 838 (1967) 9
Mercantile National Bank v. *Langdeau*, 371 U.S. 555 (1963) 2, 11, 12
Metropolitan Lumber Co. v. *Fordham National Bank in New York*, 102 N.J. E. 514, 141 A. 742 (1928) 9
National Bank of Savannah v. *Cravens*, 147 Ga. 753, 95 S.E. 246 (1918) 9

OTHER AUTHORITIES

Overman & Hilliker, *State Court's Limited Power to Issue A Preliminary Injunction Against A National Bank*, 92 BANK L.J. 606, 617 (1975) 12

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. .....

THIRD NATIONAL BANK IN NASHVILLE, *Petitioner*,

vs.

IMPAC LIMITED, INC., F. MURRAY PARKER and JAMES K. WALL, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

Petitioner prays that a writ of certiorari issue to review the final order of the Supreme Court of the State of Tennessee entered herein on August 16, 1976.

OPINIONS BELOW

The opinion of the Supreme Court for the State of Tennessee is published in 541 S.W.2d 139 (1976) and is printed in Appendix A hereto at p. A1. The Chancellor's order granting Respondents' application for a temporary injunction is unreported and is printed in Appendix B at p. A10. The Chancellor's Memorandum and Order dissolving the temporary injunction and granting Respondents leave to perfect an interlocutory appeal to the Supreme Court of Tennessee are unreported and are printed in Appendix C at p. A12.

JURISDICTION

The final order of the Supreme Court of Tennessee was entered on August 16, 1976, and is appended hereto at page A9. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).*

QUESTION PRESENTED FOR REVIEW

Whether, in light of 12 U.S.C. § 91 (1970) and *Pacific National Bank of Boston* v. *Mixter*, 124 U.S. 721 (1888), a state court has jurisdiction prior to a final judgment, to enjoin a national banking association from foreclosing on collateral?

STATUTE INVOLVED

Petitioner relies on Section 91 of the National Banking Act, 12 U.S.C. § 91 (1970) which provides as follows:

> All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to

*The issue presented—whether the state court lacked subject matter jurisdiction to temporarily enjoin petitioner, a national bank—"is a separate and independent matter anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiffs' cause of action." *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 558 (1963). Moreover, unless addressed prior to a hearing on the merits, the issue would consistently evade resolution since a temporary injunction, by its very nature, is operative only prior to a hearing on the merits.

> prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; *and no attachment, injunction, or execution shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court.* (Emphasis added).

STATEMENT OF THE CASE

This case arises from an interlocutory appeal taken from an order of the Chancery Court of Davidson County (Nashville) Tennessee dissolving its temporary injunction earlier issued against the petitioner. The relevant and uncontroverted facts are as follows:

1. Petitioner is a national banking association organized under the laws of the United States of America and maintains its principal place of business in Nashville, Tennessee.
2. On May 18, 1973 Petitioner made a construction loan to Respondents evidenced by a $700,000.00 note the payment of which is secured by a deed of trust encumbering real property and improvements.
3. Upon completion of the construction and subject to Respondents' meeting certain conditions within the prescribed time, First and Mid-South Mortgage Company (Permanent Lender) had agreed to provide a permanent loan to Respondents to be secured by the same real property and improvements. Although Petitioner and the Permanent Lender

granted Respondents' requests for two extensions of time, the commitment for permanent financing expired on July 31, 1975. The Permanent Lender refused to make the permanent loan to Respondents based upon its determination that Respondents had not met the necessary conditions.

4. Petitioner determined that Respondents' construction loan was in default in August of 1975 and caused the substitute trustee under the deed of trust to publish notice of foreclosure.

5. On September 26, 1975 Respondents filed a complaint in the Chancery Court of Davidson County, Tennessee seeking to restrain the Petitioner from foreclosing against its collateral. At an *ex parte* hearing, the Chancellor issued a restraining order and ordered the Petitioner to appear and show cause why a temporary injunction should not issue.

6. At the show cause hearing held October 14, 1975, the Chancellor issued a temporary injunction enjoining the Petitioner from foreclosing Respondents' property. See Appendix B at pp. A10-A11.

7. The Petitioner immediately moved the Court to dissolve the injunction for lack of subject matter jurisdiction. In a memorandum filed December 9, 1975 and an order entered January 8, 1976, the Chancellor concluded that Section of the National Banking Act "remove[s] the jurisdiction of the Court to grant temporary injunctions prohibiting the foreclosure of property in which the bank has a security interest," dissolved the injunction, and granted Respondents leave to perfect an interlocutory appeal to the Supreme Court of Tennessee.

8. With one justice dissenting and one not participating, the Supreme Court of Tennessee *held* that, prior to a final judgment Section 91 of the National Bank Act does not bar a state court from issuing a temporary injunction restraining a national bank from foreclosing on its collateral. The Chancellor's order was reversed.

REASONS FOR GRANTING THE WRIT

I.

The Tennessee Supreme Court's Construction of Section 91 of the National Bank Act Is Contrary to the Plain Meaning of the Statute and Is Contrary to Its Construction by The Supreme Court of the United States.

The Tennessee Supreme Court held that Section 91 does not prevent a state trial court prior to final judgment from enjoining a national bank from foreclosing on property in which it owns a security interest. This holding is in direct conflict with the express prohibition of Section 91 of the National Bank Act and with holdings of The Supreme Court of the United States.

A. The Legislative and Judicial History of Section 91.

Section 91 is the result of inartful codifications of amendments, deletions and amalgamations of much earlier legislation.

---

1. Act of June 3, 1864, Ch. 106, § 57, 13 Stat. 116.

The anti-injunction prohibitions of Section 91 were first enacted in 1873 as an appendage to Section 57 of the Act of June 3, 1864[1]. Section 57 originally read:

> "That suits, actions, and proceedings against any association under this Act, may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established, or in any state, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases; *Provided, however*, That all proceedings to enjoin the comptroller under this Act shall be had in a circuit, district, or territorial court of the United States, held in the district in which the association is located."

The anti-injunction provisions of the 1873 Amendment to Section 57 read:

> "*And provided further*, That no attachment, injunction, or execution shall be issued against such association, or its property, before final judgment in any such suit, action or proceeding in any state, county, or municipal court."[2]

In 1875, the 1873 Amendment was placed at the end of Section 52 of the National Bank Act and it continues to appear in that form today.[3]

Although Section 52 of the old National Bank Act dealt with the avoidance of preferential transfers of the assets of insolvent national banks, the United States Supreme Court held the appending of the 1873 anti-injunction provision to a section dealing with insolvent national banks does not limit the scope of the prohibition of the 1873 Act.

---

2. Act of March 3, 1873, Ch. 269, § 2, 17 Stat. 603.
3. Act of February 18, 1875, Ch. 80, 18 Stat. 320.

The Supreme Court in 1888 held:

> "Although the provision(s) [of Section 91 were] evidently made to secure equality among the general creditors in the division of the proceeds of the property of an insolvent bank, its operation is by no means confined to cases of actual or contemplated insolvency. The remedy is taken away altogether and cannot be used under any circumstances.
>
> "It was further said that if the power of issuing attachments has been taken away from the state courts, so also is the power of issuing injunctions. That is true."[4]

Again, in 1905, The Supreme Court held:

> "The language of the latter clause of this section would seem to be too plain to admit of discussion as to its meaning. It in terms forbids the issuing of an attachment, injunction, or execution against a national bank or its property before final judgment in any suit, action, or proceeding in any state, county, or municipal court."[5]

B. The Erroneous Construction of Section 91 by the Tennessee Supreme Court.

While the Tennessee Supreme Court did recognize that the anti-injunction provision of Section 91 is not restricted to circumstances involving insolvent national banks, the Tennessee Court nevertheless characterized the above-quoted passages from the *Mixter* and *Van Reed* cases as *obiter dicta*. That is, the Tennessee Supreme Court

---

4. *Pacific National Bank of Boston* v. *Mixter*, 124 U.S. 721, 727-728 (1888).
5. *Van Reed* v. *Peoples National Bank*, 198 U.S. 554, 558 (1905).

held that Section 91 is not an absolute prohibition against the issuance of injunctions prior to final judgment. The Tennessee Court concluded that, despite the plain language of Section 91 and its clear construction in the *Mixter* and *Van Reed* cases, a state court is not prohibited from issuing an injunction against a national bank which is seeking to foreclose on collateral.

It is obvious that the only basis for the Tennessee Court's unprecedented and restricted construction of Section 91 was its desire to obtain a result which comports with its notions of fairness. The opinion states that the Section 91 prohibition applies if a national bank is in the defensive posture of resisting its creditor's attempt to obtain a temporary injunction against the bank or its property but does not apply where a national bank is seeking to foreclose on collateral owned by its resisting debtor. However, the anti-injunction language of Section 91 does not distinguish injunctions sought by a bank's creditors from injunctions sought by a bank's debtors. In short, the Tennessee Court's limited reading of the *Mixter* and *Van Reed* cases is without support in either the language or the purpose of the statute.

A preliminary injunction against a lender restraining its rights of foreclosure is a judicial act which clearly interferes with the bank's property rights and with the bank's management and control of its assets. A preliminary injunction against a bank's contractual right of foreclosure is as much an action against a bank's assets as was the illegal attachment of the bank's funds in the *Mixter* and *Van Reed* cases. In many instances the harm which results from unwarranted and precipitous interference with collateral held by a national bank is as great as the harm from judicial interference with a bank's own funds.

II.

The Tennessee Supreme Court's Construction of Section 91 Deprives National Banks in Tennessee of Powers and Privileges Possessed by National Banks in Other States.

The state court cases consistently have held that the anti-injunction provision of Section 91 does apply where a debtor is seeking to prevent a national bank from foreclosing on its collateral.[6] Mr. Justice Holmes, writing for the Supreme Judicial Court of Massachusetts, laid to rest Respondents' contention that the strictures of Section 91 do not apply to injunctions obtained by a debtor to restrain a national bank's disposition of collateral.

> "The argument is only that it is unreasonable that Congress should go so far; that the presumable motive for the law was to prevent an important wheel of business being stopped; and that this motive could be satisfied by limiting the injunctions mentioned to such as would place the general assets of the bank beyond its control, by mesne process having the effect of an attachment.
>
> "But such arguments are very doubtful ground for giving words an unnatural construction. The words used are of unlimited scope. The limited interpretation gives them an unusual meaning. The prohibition, whether reasonable or not, is intelligible when we

---

6. *National Bank of Savannah* v. *Cravens*, 147 Ga. 753, 95 S.E. 246 (1918); *Metropolitan Lumber Co.* v. *Fordham National Bank in New York*, 102 N.J. E. 514, 141 A. 742 (1928); *First National Bank of Oakland* v. *Superior Court*, 240 Cal. App. 2d 109, 49 Cal. Rptr. 358, *cert. denied* 383 U.S. 829 (1966); *Kemple* v. *Security First National Bank of Los Angeles*, 57 Cal. Rptr. 838 (1967). The federal courts have not had occasion to determine the applicability of the anti-injunction provisions of Section 91 to instances in which a debtor seeks to enjoin a national bank's foreclosure on collateral.

consider that, at the time when the prohibition was first passed, any plaintiff was at liberty to sue in the United States courts, and could obtain an injunction there. The fact that this power has been taken away cannot change the construction of the words."[7]

Given the consistent construction of Section 91 by the courts of many states, it is obvious that a national bank foreclosing in Tennessee is subject to restrictions it would not encounter foreclosing in Georgia, Massachusetts or California. The anomaly of the Tennessee Court's holding is illustrated by a hypothetical instance in which a national bank holds a mortgage on a tract of real property located in both Tennessee and Georgia. Foreclosure could not be enjoined in Georgia prior to a final judgment but could be enjoined in Tennessee at any time, without regard to a final judgment.

The novel construction of Section 91 by the Tennessee Supreme Court creates an unwarranted inconsistency in the federal framework which the Congress has created for the regulation of its corporate creations, national banks. The Tennessee Court's construction of Section 91 is repugnant to the notion of uniformity in the federal policy of regulating legal actions against national banks.

III.

The Tennessee Supreme Court Does Not Have the Judicial Power to Create an Exception to a Federal Statute Which Creates Rights and Immunities for National Banks.

The plain language of Section 91 prohibits a state court from issuing an injunction against a national banking asso-

7. *Freeman Mfg. Co.* v. *National Bank of Boston*, 160 Mass. 398, 399, 35 N.E. 865 (1894).

ciation or its property before final judgment in "any suit". There are no exceptions to this unambiguous statutory prohibition.[8]

Unlike the nominal status of the national bank in *Earle* v. *Pennsylvania*[9], the Petitioner's assets are directly and adversely affected by state court action which bars foreclosure on valuable collateral prior to final judgment. Thus, the Tennessee Supreme Court's opinion creates an exception which permits an injunction against the bank's property, *i.e.* the right to foreclose on collateral.

The Congress in Section 91 created a restriction on the manner in which a national bank can be sued. The Tennessee Court's construction of Section 91 constitutes a clear conflict with this federally created restriction. In *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 558-559 (1963), the Supreme Court held:

> "National banks are quasi-public institutions, and for the purpose for which they are instituted are national in their character, and, within constitutional limits, are subject to the control of Congress and *are not to be interfered with by state* legislative or *judicial action*, except so far as the lawmaking power of the Government may permit. *Van Reed* v. *Peoples National Bank*, 198 U.S. 554, 557, 49 L.ed 1161, 1162, 25 S.Ct. 775. Unquestionably, Congress had authority to prescribe the manner and circumstances under which the banks could sue or be sued in the courts and it

8. Injunctions prior to final judgment have been permitted in suits where a national bank is merely a nominal party and has no pecuniary interest which is affected by the issuance of the injunction. In *Earle* v. *Pennsylvania*, 178 U.S. 449, at 454 (1900), Justice Harlan explained: [A]n attachment against a bank or its property as *garnishee* is not an attachment against the bank or its property. . . . It is an attachment to reach the property or interests held by the bank for others."

9. 178 U.S. 449 (1900).

addressed itself to this matter. . . ." (Emphasis supplied)

If a litigant is aggrieved by the manner in which Congress has restricted actions against national banks, "such a situation is a matter for Congress to consider."[10]

Admittedly, in the present case, the Court is called upon to apply a federal statute which creates a favorable judicial immunity for national banks. The response of the Tennessee Court was to fashion an unwarranted amendment to Section 91. Under the Federal Constitution, the judiciary is barred from interposing upon a federal statute the court's own notion of fairness.[11]

> The answer is that we must apply the statute as we find it, leaving to Congress the correction of asserted inconsistencies and inequalities in its operation. *McClain* v. *C.I.R.*, 311 U.S. 527, 530 (1941).

State courts, like the federal courts, cannot construe federal legislation in cavalier disregard of its plain meaning.

> The responsibility of this Court, however, is to construe and enforce the Constitution and laws of the land as they are and not to legislate social policy on the basis of our own personal inclinations. *Evans* v. *Abney*, 396 U.S. 435, 447 (1970).

If not reversed, the decision of the Supreme Court of Tennessee creates an exception that is so broad and so substantial that it ignores the statute and overrules *Mixter* and *Van Reed*.

---

10. *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 563 (1963).

11. *See* Overman & Hilliker, *State Court's Limited Power to Issue a Preliminary Injunction Against a National Bank*, 92 BANK L. J. 606, 617 (1975).

CONCLUSION

The decision reached by three of the five justices of the Tennessee Supreme Court is an erroneous and unwarranted construction of Section 91 of the National Bank Act. The Tennessee decision constitutes an impermissible infringement on the historic, federally created right of national banks to be free from prejudgment injunctive process. The decision invites further unwarranted interference by state action in this area. It is for this Court to preserve the laws of Congress from disingenuous distinctions previously considered and rejected.

Accordingly, it is respectfully submitted that this petition for certiorari should be granted to review the opinion and judgment of the Supreme Court of the State of Tennessee.

Respectfully submitted,

THOMAS P. KANADAY, JR.
FARRIS, EVANS & WARFIELD
18th Floor
Third National Bank Building
Nashville, Tennessee 37219
Attorney for Petitioner

Of Counsel:
STEPHEN W. RAMP
FARRIS, EVANS & WARFIELD
18th Floor
Third National Bank Building
Nashville, Tennessee 37219

APPENDIX

APPENDIX A

[OPINION OF THE SUPREME COURT OF TENNESSEE]

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

For Publication

Filed August 16, 1976

Davidson Equity

IMPAC LIMITED, INC., F. MURRAY PARKER and JAMES K. WALL,
Appellants

vs

THIRD NATIONAL BANK and FIRST AND MID-SOUTH MORTGAGE COMPANY,
Appellees

Honorable Ben H. Cantrell
Chancellor

OPINION

[FONES, J.]

The question presented by this interlocutory appeal is whether a section of the National Bank Act prohibits a state court from issuing an injunction against a national bank, as mortgagee, temporarily restraining it from foreclosing upon appellant's property.

Appellant brought this action against appellee in the Chancery Court of Davidson County when appellee declared appellant in default on a note secured by a deed of trust on real property and advertised the property for sale, pursuant to terms contained in the deed of trust. Appellant sought to enjoin appellee from proceeding with the foreclosure sale and set forth the grounds upon which it sought the injunction. The Chancellor found, upon the pleadings, exhibits, and arguments of counsel at the show cause hearing, that there existed issues which should be determined upon a full hearing; and that appellants would suffer irreparable harm if the foreclosure sale occurred prior to the hearing. Upon these findings, the Chancellor issued a temporary injunction prohibiting appellee from foreclosing on appellant's property prior to a full hearing on the merits of the cause.

Appellee then moved the Trial Court to dissolve the temporary injunction on the basis that 12 U.S.C.A. §91, denied the Court jurisdiction to issue the injunction. The motion was granted, and the Chancellor allowed appellant a discretionary appeal to this Court.

The statute upon which appellee relies, reads as follows:

> §91. *Transfers by bank and other acts in contemplation of insolvency*
>
> All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation

> thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction, or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court.

Appellee maintains that this statute, and the case law construing it, prohibits the courts of this State from issuing an interlocutory injunction against a national bank under any circumstances. This view necessarily encompasses the position that regardless of the degree of wrongdoing on the part of a national bank against one of its debtors, resulting in irreparable damage, our courts, both state and federal, are prohibited from exercising jurisdiction and allowing an equitable remedy until a full trial on the merits of the cause has been completed. We cannot accept appellee's position as a correct exposition of the law.

The leading case construing the statute is *Pacific National Bank of Boston* v. *Mixter*, 124 U.S. 721, 8 S.Ct. 718, 31 L.Ed. 567 (1888). There plaintiffs began a suit against the bank in the United States Circuit Court (now District Court) of Massachusetts by writ of attachment for the amounts owed them. At the time the lawsuit was instituted, the bank was solvent; but it later closed, and a receiver was appointed to wind up its affairs. The question before the Court was whether an attachment could issue against a solvent national bank before final judgment in a suit begun in federal court.

The Court noted that although the prohibition against interlocutory injunctions did not expressly apply to federal

courts, those courts were only authorized to issue attachments in common law causes as provided by the applicable state law. The Court held that the power of state courts to issue attachments (and injunctions) prior to final judgment had been eliminated by the federal statute and that the statute was not limited to protecting insolvent banks:

> Although the provision was evidently made to secure equality among the general creditors in the division of the proceeds of the property of an insolvent bank, its operation is by no means confined to cases of actual or contemplated insolvency. The remedy is taken away altogether and cannot be used under any circumstances.
>
> 124 U.S. at 727.

We are of the opinion that the precedential value of the broad language of the last quoted sentence is limited to the facts of the case in which it was spoken, and that the *ratio decidendi* of *Mixter* does not extend to the facts of the case at bar. We reach this conclusion only after a careful search for subsequent decisions of the United States Supreme Court interpreting 12 U.S.C.A. §91. We are unable to find that the *Mixter* rationale has been applied to the converse situation; that is, a situation in which a debtor of a national bank is seeking, by interlocutory injunction, to protect *his* property from wrongful seizure and foreclosure sale by the bank. *See, Van Reed* v. *People's National Bank of Lebanon,* 198 U.S. 554, 25 S.Ct. 775, 49 L.Ed. 1161 (1905); *Mechanics Universal Joint Company* v. *Culhane,* 299 U.S. 51, 57 S.Ct. 81, 81 L.Ed. 33 (1936). Nor have we found any federal court of appeals or district court decisions which make the *Mixter* decision so applicable.

Although we have read with interest the opinions in other states which hold contra to our decision today,

Freeman Mfg. Co. v. *National Bank of Boston,* 160 Mass. 398, 35 N.E. 865 (1894); *Metropolitan Lumber Co.* v. *Fordham Nat. Bank,* 102 N.J.Eq. 514, 141 A. 742 (1928); *First National Bank of Oakland* v. *Superior Court,* 240 Cal.App. 2d 109, 49 Cal.Rptr. 358, *cert. denied* 385 U.S. 829 (1966), we are not persuaded by what appears to be blind reliance on *dicta* in the federal cases. Rather, we look to the purpose of the statute which was to secure the assets of a bank, whether solvent or insolvent, for ratable distribution among its general creditors and to protect national banks in general. *See, e.g., First National Bank* v. *Colby,* 21 Wall. 609, 22 L.Ed. 687 (1874); *Loew's Inc.* v. *Superior Court,* 301 P.2d 64 (Cal.App. 1956).

In our opinion, the decision in *Earle* v. *Penn, et al.,* 178 U.S. 449, 44 L.Ed. 1146, 20 S.Ct. 915 (1900), undermines the literalism accorded by courts of our sister states to the *Mixter* Court's statement that the remedies of attachment, injunction and execution are taken away altogether and cannot be used under any circumstances. A writ of attachment by garnishment was issued and served upon the Chestnut Street National Bank, as garnishee, to reach the assets of one James Long; and upon the answer and interrogatories filed by the bank, judgment was entered against the bank. Shortly thereafter the bank closed, and Earle was appointed receiver. He intervened and moved to vacate the judgment and dismiss the attachment upon the authority of the statute under consideration here. In reviewing the decision of the Supreme Court of Pennsylvania sustaining the attachment and judgment against the bank or garnishee, Mr. Justice Harlan, writing for the court said:

> "Sections 5234, 5235, and 5236, above quoted, have reference to the affairs and property of national banks in the hands of receivers, and the administration of

its assets by the Comptroller; and the words in § 5242, 'no attachment, injunction, or execution shall be issued against such association or its property before final judgment in any suit, action, or proceeding in any state, county, or municipal court,' are to be construed in connection with the previous parts of the same section declaring null and void certain transfers, assignments, deposits, and payments made after the commission by the bank 'of an act of insolvency, or in contemplation thereof.' With the intent to prevent the application of the bank's assets in the manner prescribed by Congress, or with a view of the preference by the bank of one creditor to another. Whatever may be the scope of §5242, an attachment sued out against the bank *as garnishee* is not an attachment against the bank or its property, nor a suit against it, within the meaning of that section. It is an attachment to reach the property or interests held by the bank for others."

178 U.S. at 453, 454.

In the instant case, appellee is not using the statute as a shield to protect its assets, but is using it to preclude appellant from protecting its own property. True, appellee has a security interest of $700,000 in the property. However, the property is in the form of an office building allegedly worth in excess of $1,000,000 which cannot be sold, or assigned, or spirited away in the dark of the night so as to defeat appellee's security interest. The Chancellor predicated the temporary injunction (before it was dissolved) upon the condition that appellant continue to pay interest on the $700,000 at the contract rate until a final determination on the merits could be made. In short, appellee's security interest in appellant's property was completely protected.

Without the issuance of the temporary injunction, however, appellant's property would have been sold without equity of redemption; and its only remedy would be to bring an action against the bank for damages. This type of inadequate and incomplete relief at law prompted the fashioning of equitable relief, which appellee says is not available in this situation.

Appellee seeks to rely on the procedure of public foreclosure sale sanctioned by the laws of this State, but maintains that appellant is unable to avail itself of the statutory protection of T.C.A. §§23-2401 *et seq.* We cannot allow appellee to avail itself of the law favorable to it and not be bound by that part which accords relief to appellant, *State* v. *Superior Court*, 128 Wash. 100, 222 P. 203 (1924).

We have determined that the United States District Courts in this State would have no jurisdiction to entertain this action, *Bachman* v. *First Mechanics Nat. Bank of Trenton*, 69 F.Supp. 739 (D.C. N.J. 1947); *Rooney* v. *First Wisconsin National Bank*, 332 F.Supp. 108 (1971), and that our State courts provide the only forum in which appellant may obtain relief.

Reversed and remanded to the Chancery Court of Davidson County for proceedings consistent with this opinion. Costs of this appeal are adjudged against appellee.

/s/ Wm. H. D. Fones
Wm. H. D. Fones,
Justice

Concur:
Cooper, C.J.
Harbison, J.
Henry, J., not participating
Brock, J., dissents—see separate opinion

DISSENTING OPINION

[BROCK, J.]

I respectfully dissent. I do so most reluctantly because the majority opinion has reached a just result. It is my view, however, that the last clause of 12 U.S.C.A., § 91, absolutely forbids the issuance by a state court of a temporary injunction or any similar process against a national bank prior to entry of a final judgment or decree. That clause provides:

> ". . .; and no attachment, injunction, or execution, shall be issued against such (national banking) association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court."

As acknowledged in the majority opinion, the Supreme Court of the United States has construed this provision to apply not only to insolvent national banks but to solvent ones as well. That Court has said that "The remedy is taken away altogether and cannot be used under any circumstances." *Pacific National Bank of Boston* v. *Mixter*, 124 U.S. 721, 8 S. Ct. 718 (1888). The opinion in the *Mixter* case traces the legislative history of § 91 and makes clear that the intent of Congress was to protect all national banks from all pre-judgment injunctions, attachments, etc., issuing from state courts. The distinction made in the majority opinion between state court actions brought by *debtors* of a national bank and those brought by *creditors* of a national bank is, in my opinion, not a valid one because the harm to the national bank defendant is the same whether the injunction is sought by a debtor or by a creditor. See *First National Bank of Oakland* v. *Superior Court*, 240 Cal. App. 2d 109, 49 Cal. Rptr. 358 (1966), cert. den. 87 S. Ct. 65 (1966); *Miller* v. *Mercantile National Bank of Hammond*, 234 Ind. 202, 125 N.E.2d 720 (1955); *Kemple* v. *Security First National Bank of Los Angeles*, 249 C.A. 719, 57 Cal. Rptr. 838 (1967); *Freeman Mfg. Co.* v. *National Bank of Republic*, 160 Mass. 398, 35 N.E. 865 (1894). A temporary injunction by a debtor restraining foreclosure of a deed of trust belonging to the bank constitutes interference with the assets of the bank in the same way as does an attachment by a creditor of the same deed of trust. Accordingly, I would hold that the Chancellor was correct.

/s/ Ray L. Brock
Brock, J.

SUPREME COURT, NASHVILLE

Davidson Equity

Reversed and Remanded.

IMPAC LIMITED, INC., F. MURRAY PARKER and JAMES K. WALL,

Appellants

vs.

THIRD NATIONAL BANK and FIRST AND MID-SOUTH MORTGAGE COMPANY,

Appellees

This cause coming on to be heard upon a transcript of the record from the Chancery Court of Davidson County, assignments of error, reply brief and argument of counsel, upon consideration whereof the Court is of opinion that in the decree of the Chancellor there is reversible error.

In accordance with the opinion of the Court filed herein, it is, therefore, ordered and decreed by this Court

that the decree of the Chancellor be reversed and that the cause be remanded to the Chancery Court of Davidson County for proceedings consistent with the Court's opinion, a certified copy of which will accompany the procedendo on the remand, and for the collection of the costs of the cause below; for all of which, let procedendo issue.

The costs of the appeal will be paid by Third National Bank in Nashville, for which execution may issue if necessary. 8/16/76.

(Brock, J., Dissenting)

APPENDIX B

[ORDER OF THE CHANCERY COURT GRANTING THE PRELIMINARY INJUNCTION]

NO. A-6089

IMPAC LIMITED, INC., F. MURRAY PARKER and JAMES K. WALL,
Plaintiffs

vs.

THIRD NATIONAL BANK and FIRST AND MID-SOUTH MORTGAGE COMPANY,
Defendants

ORDER

This cause having come on to be heard upon application of Plaintiffs for a temporary injunction enjoining Defendant, Third National Bank, from foreclosing that property known as Lots Nos. 8, 19 and 10 on the unrecorded Map of South Brentwood in Davidson County, Tennessee,

pending further orders of this court and a show cause order requiring Third National Bank to appear and show cause if any it has why said temporary injunction should not be granted.

From all of which it appears to the Court, based upon the pleadings, exhibits filed by Plaintiffs, and extensive argument of counsel, that Plaintiffs have sufficiently shown the existence of issues which should be determined upon a full hearing of this cause and that Plaintiffs would suffer irreparable harm if the foreclosure occurred prior to such full hearing.

It is accordingly ordered, adjudged and decreed that Defendant, Third National Bank, is temporarily enjoined from foreclosing the subject property pending the final hearing of this cause upon Plaintiffs posting a bond in the amount of Five Thousand and No/100 ($5,000.00) Dollars and upon Plaintiffs paying the two months interest currently in arrears. It is further ordered, adjudged and decreed that Plaintiffs shall pay said interest monthly and the rentals obtained from the leases on said building shall be applied first to said interest. The interest payments shall be made direct to Third National Bank, on or before the 5th day of each month, a default of which shall automatically dissolve this injunction.

/s/ Ben H. Cantrell
Ben Cantrell, Chancellor
Part One, Davidson Chancery

APPENDIX C

[MEMORANDUM AND ORDER OF THE CHANCERY COURT DISSOLVING THE TEMPORARY INJUNCTION AND PERMITTING AN INTERLOCUTORY APPEAL THEREFROM]

IN THE CHANCERY COURT,
PART ONE,
AT NASHVILLE.

NO. A-6089

IMPAC LIMITED, INC., ET AL

vs.

THIRD NATIONAL BANK ET AL
MEMORANDUM

At a show cause hearing held to determine if the Bank should be enjoined from foreclosure of the property described in the complaint, the Court issued a temporary injunction stopping the sale. The Bank has filed a motion to dissolve the temporary injunction citing USCA §12-91. The parties have extensively briefed the question. Based upon the authorities cited in the briefs, it is the opinion of the Court that this Court lacks jurisdiction to issue the injunction.

Section 91 of 12 USCA reads as follows:

"*Transfer by bank and other acts in contemplation of insolvency*

All transfers of notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments

or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction, or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court." R.S. §5242.

In the case of *Pacific National Bank of Boston* v. *Mixter*, 124 U.S. 721 (1888), the Supreme Court of the United States said:

"Although the provision(s) [of Section 91 were] evidently made to secure equality among the general creditors in the division of the proceeds of the property of an insolvent bank, its operation is by no means confined to cases of actual or contemplated insolvency. The remedy is taken away altogether and cannot be used under any circumstances.

"It is further said that if the power of issuing attachments has been taken away from the state courts, so also is the power of issuing injunctions. That is true."

The rule announced in the *Mixter* case appears to have survived in an unbroken line of authority to the present time. There are only two exceptions which the Court finds in the briefs submitted by the parties. The first and most significant exception is found in the case of *Southern Alaska Canning Company* v. *Superior Court for King*

County, et al., 222 P. 203 (Wash., 1924). In that case the Bank was foreclosing a chattel mortgage and had issued notice of sale to the sheriff who took the mortgaged property into possession. The mortgagor instituted a proceeding in the Superior Court seeking to have the foreclosure transferred to that court alleging that it did not owe the Bank all of the sum set out in the notices but was entitled to a credit in a large sum. The Court issued a temporary injunction staying the action of the sheriff. This injunction was given without bond. It is true that the Court in that case used the following language:

> "That statute cannot have any weight here. Although the mortgagee was and is a national bank, it has undertaken in its foreclosure to take advantage of the statutes of this state, and it cannot take action under a part of that statute without being also bound by the other provisions of it."

However, the Court earlier in its opinion had confined its investigation to the question of whether or not the mortgagor must post bond in order to get the foreclosure removed to the Superior Court. The Court said:

> "The sole question before us is, where a mortgagor has instituted proceedings to transfer to the Superior Court a pending foreclosure by notice and sale given by the sheriff, of his chattel mortgage, must he give a bond before the Court will restrain the sheriff from further proceedings?"

So the injunction in that case was not to restrain the Bank from foreclosing but was to restrain the sheriff from proceeding after, under the laws of that state, an action had been instituted to transfer the foreclosure to the Superior Court. The action was not to stop the foreclosure but to transfer it to the court.

The only other exception discovered in the cases is where the property which is the subject of the injunction does not belong to the Bank.

Therefore, it seems to the Court to be clear that the statute above cited removes the jurisdiction of the Courts to grant temporary injunctions prohibiting the foreclosure of property in which the Bank has a security interest. Therefore, the injunction should be dissolved. Mr. Kanaday will prepare the decree.

/s/ Ben H. Cantrell
Ben H. Cantrell, Chancellor

This December 9, 1975

NO. A-6089

IMPAC LIMITED, INC., ET AL

vs.

THIRD NATIONAL BANK, ET AL

ORDER

This cause came on to be heard upon motion of Defendant, Third National Bank, to dissolve a temporary injunction against foreclosure of the property described in the complaint, said motion to dissolve being based upon the fact that the court did not have jurisdiction to grant a temporary injunction against a national bank pursuant to USCA §12-91.

It is the opinion of the court, after reading the statute and the cases cited by counsel, that the statute so cited does remove the jurisdiction of the court to grant temporary injunctions prohibiting the foreclosure of property in which the bank has a security interest.

It is accordingly ordered, adjudged and decreed that the injunction heretofore granted should be dissolved.

However, pursuant to motion of Plaintiff for a discretionary appeal from said order, and said order dissolving an injunction heretofore granted, and it further appearing that the order involves a question of law as to which there is substantial ground for difference of opinion, that question being whether a state court is prohibited by USCA §12-91 from granting a temporary injunction against a national bank when that bank has a security interest in the subject property;

It is accordingly ordered, adjudged and decreed that the Plaintiff is granted an appeal from the above order, to the Supreme Court, upon perfecting said appeal within (30) days from the date of entry of the order.

* * *

This 8th day of February, 1976

/s/ Ben H. Cantrell
Chancellor

Supreme Court, U. S.
FEB 23 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-674

THIRD NATIONAL BANK IN NASHVILLE,
Petitioner,

vs.

IMPAC LIMITED, INC., et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

Petition for Certiorari Filed November 13, 1976
Certiorari Granted January 10, 1977

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

TABLE OF CONTENTS

Relevant Docket Entries 1

Complaint 2

Exhibits to Complaint—

A. Permanent Lender's Commitment Letter 9

B. Title Insurance Commitment 13

C. Agreement of Borrower, Temporary Lender and Permanent Lender 15

D. Construction Commitment Letter 22

E. Letter Dated May 12, 1975 26

F. Letter Dated July 8, 1975 28

G. Notice of Foreclosure 29

Chancellor's Show Cause Order 31

Answer of Third National Bank in Nashville 32

Affidavit of Paul J. Brown 37

Exhibits to Affidavit of Paul J. Brown—

A. Note Executed by Respondents 42

B. Deed of Trust 43

C. Agreement (Filed as Exhibit C to Complaint) 45

D. Letter Dated January 30, 1973 (Filed as Exhibit A to Complaint) 45

E. Letter Dated May 30, 1973 (Filed as Exhibit D to Complaint) 45

F. Letter Dated May 16, 1975 45

G. Letter Dated September 4, 1975 46

Affidavit of Charles W. Cook, Jr. 47

Affidavit of John A. Thweatt and Letter of June 24, 1975 48

Chancellor's Order Granting the Preliminary Injunction 56

Supplemental Answer of Third National Bank in Nashville 57

Motion of Third National Bank in Nashville 58

Answer of First and Mid-South Mortgage Company 58

Chancellor's Memorandum Re Dissolving the Injunction 65

Chancellor's Order Dissolving the Temporary Injunction and Permitting an Interlocutory Appeal Therefrom 68

Opinion of the Supreme Court of Tennessee 70

Dissenting Opinion of the Supreme Court of Tennessee 77

Order 79

RELEVANT DOCKET ENTRIES

September 26, 1975 Complaint, filed.

September 26, 1975 Order to Show Cause, filed.

October 7, 1975 Answer of Defendant Third National Bank in Nashville, filed.

October 14, 1975 Affidavit of Paul J. Brown, filed.

October 14, 1975 Affidavit of Charles W. Cook, Jr., filed.

October 14, 1975 Affidavit of John A. Thweatt, filed.

October 14, 1975 Order, filed.

October 16, 1975 Supplemental Answer of Third National Bank in Nashville, filed.

October 16, 1975 Motion of Third National Bank in Nashville, filed.

November 6, 1975 Answer of First and Mid-South Mortgage Company, filed.

December 9, 1975 Memorandum, filed

January 8, 1976 Order, filed.

August 16, 1976 Opinion of the Supreme Court of Tennessee, filed.

August 16, 1976 Dissenting Opinion of Justice Brock, filed.

August 16, 1976 Order, filed.

IN THE CHANCERY COURT OF
DAVIDSON COUNTY, TENNESSEE

No. A-6089

IMPAC LIMITED, INC.,
F. MURRAY PARKER and
JAMES K. WALL,
Plaintiffs,

vs.

THIRD NATIONAL BANK

and

FIRST AND MID-SOUTH
MORTGAGE COMPANY,
Defendants.

COMPLAINT

(Filed September 26, 1975)

Come the Plaintiffs, Impac Limited, Inc., F. Murray Parker and James K. Wall, and would respectfully show unto the court as follows:

1. That Plaintiffs, James K. Wall and F. Murray Parker, are owners of the property known as the Brentwood Plaza Office Building in Davidson County, Tennessee, said property being specifically described as follows:

> Being Lots Nos. 8, 9 and 10 on the unrecorded Map of South Brentwood, in the 6th Civil District of said County, described as follows:
>
> BEGINNING at the southeast corner of Wilson and Harpeth Pike and Frierson Street, formerly Elm Street; thence running southerly with the easterly

> margin of said Pike 300 feet to a point; thence in an easterly direction in a line parallel with the southerly margin of Elm Street 180 feet to the westerly margin of an alley; thence in a northerly direction with the westerly margin of said alley 300 feet to a point in the southerly margin of Elm Street; thence in a westerly direction with the southerly margin of said street, 180 feet to the point of beginning.

2. That Plaintiffs sought to construct the office building, consisting of approximately Thirty Thousand (30,000) square feet in the early part of 1973. That, to proceed with construction, Plaintiffs needed both construction and permanent financing for said building. That at that time Plaintiffs were incorporated under the name of Impac Limited, Inc., with said Plaintiffs being sole stockholders. That since that time the property was transferred out of the corporation to Plaintiffs Wall and Parker, with Gail Pigg holding title in trust for and on behalf of said Plaintiffs.

3. That Plaintiffs asked for said financing from Defendant, First & Mid-South Mortgage Company, who in turn sought the construction financing from Third National Bank. Third agreed to finance the construction to a maximum amount of Seven Hundred Thousand and No/100 ($700,000.00) Dollars, provided it had the assurance of First & Mid-South that it would be "taken out" at completion of construction. This assurance would provide security for the funds extended by Third National Bank.

4. That First and Mid-South agreed with Plaintiffs and Defendant, Third National Bank, on January 10, 1973, that it would make the permanent loan with the assurance that it would take Third out at the completion of construction. A copy of said commitment is attached hereto and

marked Exhibit "A" to this complaint, but same need not be copied for process.

5. In reliance on the aforesaid assurance of First and Mid-South that it would "take out" Third, Third then agreed to make the construction loan.

6. That prior to closing, it was determined by defendants that the permanent loan would be pre-closed as a "permanent-construction" loan, i.e., that at completion of construction the construction loan would be converted into a permanent loan and Third would simply sell or assign its loan documents to First and Mid-South. Therefore, the title insurance named both Third and First and Mid-South as beneficiaries, a copy of which is attached hereto and marked Exhibit "B" to this complaint, but same need not be copied for process.

That at the time the construction loan note and deed of trust were executed by Plaintiffs, an agreement was also executed by Plaintiffs, by Third and by First and Mid-South whereby First and Mid-South agreed to purchase said note and deed of trust at completion of construction subject only to compliance with the terms and conditions of the commitment. The agreement also prohibited Plaintiffs from obtaining another first mortgage from any other lender. In other words, the permanent loan was already made, but would become effective under monthly payments, etc. at completion of construction. A copy of said agreement is attached hereto and marked Exhibit "C" to this complaint, but same need not be copied for process.

7. That extensions for completion of construction were subsequently granted to the original commitment term by both Third and First and Mid-South and First and Mid-South agreed to fund Eight Hundred Thousand

and No/100 ($800,000.00) Dollars rather than the initial Seven Hundred Thousand and No/100 ($700,000.00) Dollars. A copy of said commitment is attached hereto and marked Exhibit "D" to this complaint, but same need not be copied for process. That Plaintiffs have paid a total of Forty Thousand and No/100 ($40,000.00) Dollars for the "privilege" of having these commitments and extensions. Twenty-One Thousand and No/100 ($21,000.00) Dollars was paid to Third National Bank and Nineteen Thousand and No/100 ($19,000.00) Dollars was paid to First and Mid-South Mortgage, no portion of which has ever been returned. In addition, of course, interest has been paid up until August 1, at which time the permanent loan was to become effective.

8. That the last commitment date expired July 31, 1975. That as the time drew nearer to said expiration date, First and Mid-South, in a time of tight mortgage economy, was having difficulty obtaining another investor and would itself have to honor its own commitment. It became more and more apparent to Plaintiffs in May and June that First and Mid-South was continuously bringing up new complaints and new requirements, many of them trite and of no consequence, as set forth in the letter of May 12, 1975, which is attached hereto and marked Exhibit "E" to this complaint, but same need not be copied for process.

That approximately thirty (30) days before commitment expiration, Defendant, First and Mid-South made the totally new demand as a condition of their going forward with their obligation to take out Third from the construction loan that Plaintiffs obtain the lot adjacent to the existing building for additional parking space and obtain a survey showing the adjoining lot and additional parking space. A copy of the letter requiring same is

attached hereto and marked Exhibit "F" to this complaint, but same need not be copied for process. Plaintiffs proceeded to attempt to satisfy said requirement, to the extent that, with the permission of the owner of the property, they had pulled down the trees on said lot, and had graded and filled. However, they were placed in the absolutely impossible position of obtaining a survey to show said adjacent lot as having no encumbrances or encroachments when there was a building on said lot to be torn down. This could only be done after Plaintiffs exercised their option to purchase, which they were financially unable to do until the final closing of the permanent loan. That both Defendants were fully aware of the impossibility of this task.

That Plaintiffs were placed in the extremely frustrating position of attempting to meet new demands that were impossible to meet, and facing new ones every few days. That it finally became apparent to Plaintiffs that First and Mid-South was deliberately placing them in a position of making their performance impossible.

That although First and Mid-South knew of the expiration date, and the building had been substantially complete, lacking only tenant finish work, for more than a year, it did not make any of the above demands until after both Plaintiffs and Third had made demand for funding in May and June of 1975.

9. That all requirements of the original commitment which had not been waived by First and Mid-South were substantially completed on July 31, 1975, and would have been fully completed but for the new demands and hindrances of First and Mid-South.

10. That the loan currently outstanding to Third is Seven Hundred Thousand and No/100 ($700,000.00) Dollars. That the value of the building is approximately One Million One Hundred Thousand and No/100 ($1,100,000.00) Dollars.

11. That Third, unless restrained from so doing by this Honorable Court, will foreclose said property on November 7, 1975, at 12:00, as advertised in the Nashville Record, a copy of said advertisement being attached hereto and marked Exhibit "G" to this complaint, but same need not be copied for process.

12. That Plaintiffs are not in default on their loan either to Third or to First and Mid-South. That pursuant to the agreement (Exhibit "C"), the construction and permanent loan were consolidated, and First and Mid-South was to take out Third by buying the note and deed of trust executed by Plaintiff, Impac, in May, 1973. That First and Mid-South has wholly and totally failed to honor its commitment to Third and Third, rather than pursuing its remedy against First and Mid-South under its contract, is simply seeking to foreclose the loan and thereby wipe out Plaintiffs' equity of approximately Four Hundred Thousand and No/100 ($400,000.00) Dollars.

13. That the permanent loan was closed, that the remedy of Third is against First and Mid-South rather than Plaintiffs. That they cannot, in equity, fail to pursue that remedy to Plaintiffs' detriment. That Plaintiffs are caught between, and at the mercy of, the Defendant banks. That Plaintiffs relied on the aforesaid agreement of all parties, to the extent even that Plaintiffs were prohibited from seeking other financing under said agreement.

Premises considered, Plaintiffs pray:

1. That proper process issue and be served upon Defendants requiring them to answer within the time prescribed by law but their oaths to their answers are waived.

2. That Defendant, Third National Bank, be restrained from foreclosing the subject property pending further orders of this Court.

3. That the court find that Defendant, First and Mid-South Mortgage Company, has breached its agreement to take Third National Bank out of the construction loan as above set forth, to the detriment of Plaintiffs, and that First and Mid-South be required to specifically perform its agreement of May 18, 1973, to purchase said note and deed of trust from Third National Bank.

4. That the court find the Defendant, First and Mid-South liable for all damages accruing to Plaintiffs as a result of the aforesaid breach, and enter a judgment accordingly.

5. For such other and further relief to which Plaintiffs are justly entitled.

THIS IS THE FIRST APPLICATION FOR EXTRAORDINARY PROCESS IN THIS CAUSE.

/s/ Gail Pigg

I am surety for the costs of this cause not to exceed $250.00.

/s/ Gail Pigg

STATE OF TENNESSEE)
)
COUNTY OF DAVIDSON)

JAMES K. WALL being first duly sworn makes oath that he has read the foregoing complaint, knows the contents thereof and that the same is true to the best of his knowledge, information and belief, that this complaint

is not made out of levity or collusion with Defendants, but in truth and sincerity for the cause mentioned herein.

/s/ James K. Wall

Sworn to and subscribed before me this 25th day of September, 1975.

/s/ Gail Pigg

(Seal)

My Commission Expires: 4/27/77.

Exhibit "A"

FIRST AND MID-SOUTH MORTGAGE COMPANY
P. O. Box 2568
Nashville, Tennessee
615/254-5401

January 30, 1973

Mr. F. Murray Parker
Mr. James K. Wall
Church Street
Brentwood, Tennessee

Re: First Mortgage Loan—$700,000
Brentwood Plaza Office Building
Wilson Pike Circle, Brentwood, Tennessee

Gentlemen:

First and Mid-South Mortgage Company agrees to make a first mortgage loan on the above captioned property in the amount of $700,000 at an interest rate of 9% per annum for a term of 25 years with equal monthly installments to principal and interest.

The loan amount of $700,000 is subject to and contingent upon the leasing of at least 21,800 sq. ft. of the proposed building. This space must be rented for terms

of at least 5 years and at rates of not less than $5.50 per square foot per year that will produce $120,300 annual rental income, evidenced by copies of valid lease agreements satisfactory to this company. In the event this leasing requirement is not attained prior to expiration of this commitment the loan will be closed at the reduced amount of $575,000.

This commitment is issued subject to the following conditions:

1. The loan is to be secured by a valid first lien on the fee simple title to property located in Davidson County, Tennessee, being Lots 8, 9 & 10 on the unrecorded Map of South Brentwood, in the 6th Civil District of said County. The property fronts 300 feet on Wilson Pike and runs back between parallel lines 180 feet each to a line in the rear measuring 300 feet.

2. All legal fees and other expenses in connection with the closing of this loan are to be paid by the mortgagor.

3. Prior to closing, this company must be supplied with a survey showing no encroachments other than those approved by us and showing the building to be within lot and building lines.

4. We are to be furnished with a mortgagee's title insurance policy issued by a company approved by us.

5. Mortgagor is to furnish satisfactory proof of compliance with any and all applicable laws, regulations and zoning requirements.

6. Fire and extended coverage insurance policies are to be furnished in an amount not less than the full insurable value of the improvements, issued by companies satisfactory to us.

7. Applicant agrees to furnish, if applicant is a corporation or partnership, all appropriate papers, attorney's opinions and legal documents evidencing applicant's capacity, legal authority, good standing and the qualifications of signers to execute the loan instruments and to engage in any transaction or business in connection with which the loan is made.

8. We will require a general assignment of the rent to First and Mid-South Mortgage Company in case of default on the monthly payments.

9. The loan documents shall contain the following items or provisions:

(a) Installments shall be due and payable on the first day of each month.

(b) The holder may collect a "late charge" not to exceed an amount equal to 4% on any installment which is not paid within 15 days of the due date thereof, to cover the extra expense involved in the handling of delinquent payments, provided that collection of said late charges shall not be deemed a waiver by the holder of any of its other rights under the note.

(c) The mortgagee is to be furnished with a certified, itemized statement of annual income and expenses on the property covered by this loan, within 90 days following the end of each fiscal or calendar year.

(d) Proper covenant requiring monthly escrow deposits for payment of real property taxes and hazard insurance premiums.

10. Prior to closing the loan, the improvement must be built and completed in accordance with the plans and specifications which are to be submitted to us for approval.

11. This commitment shall expire April 30, 1973.

12. Upon acceptance of this commitment, you are to forward a check in the amount of $7,000 as a non-refundable commitment fee to First and Mid-South Mortgage Company.

13. We jointly agree that the issuance of this commitment is to expedite the beginning of construction and to assure a permanent take-out from the construction lender. Therefore, in the event interest rates increase or decrease to the extent that 9% is not competitive, then the borrowers will agree to cooperate with First and Mid-South Mortgage Company by agreeing to an increase of up to 1/4 percent if the permanent lender represented by First and Mid-South Mortgage Company has not committed by April 30, 1975. We also agree to arrange the loan at the lowest rate possible down to 8-1/2% and the competitive rate today is around 8-3/4 percent for long-term money and the First National City Bank of New York is quoting a prime bank rate of 6-1/4%. The debt service on 9% - 25 years is $5,880 per month and on 9-1/4% - 25 years is $5,997 per month.

We appreciate your offering us the opportunity to make this loan and trust that it will be handled to your entire satisfaction. Please accept and return to our office, with the proper deposit, no later than February 8, 1973.

Very truly yours,

/s/ John A. Thweatt
John A. Thweatt
Vice President

/s/ Willie K. Davis
Willie K. Davis
Executive Vice President

JAT:jy

Accepted this ..... day of February, 1973.

By: .....

Exhibit "B"

SCHEDULE A

Your No.
Commitment No. 231375

Inquiries should be directed to Suzanne Johnston

1. Effective date: April 25, 1973

2. Policy or Policies to be issued: Amount

   (a) ☐ ALTA Owners Policy—
   Form ..... —1970 $.....
   Proposed Insured:

   (b) [x] ALTA Loan Policy 1970 $700,000.00
   Proposed Insured: Third National Bank and First & Mid-South Mortgage as their interest may appear

3. The estate or interest in the land described or referred to in this Commitment and covered herein is a Fee Simple.

4. Title to said estate or interest in said land is at the effective date hereof vested in:

   IMPAC LTD., INC.

5. The land referred to in this Commitment is located in the County of Davidson

   State of Tennessee and described as follows:

Being Lots Nos. 8, 9 and 10 on the unrecorded Map of South Brentwood, in the 6th Civil District of said County, described as follows:

BEGINNING at the southeast corner of Wilson and Harpeth Pike and Frierson Street, formerly Elm Street; thence

running southerly with the easterly margin of said Pike 300 feet to a point; thence in an easterly direction in a line parallel with the southerly margin of Elm Street 180 feet to the westerly margin of an alley; thence in a northerly direction with the westerly margin of said alley 300 feet to a point in the southerly margin of Elm Street; thence in a westerly direction with the southerly margin of said street, 180 feet to the point of beginning.
Being the same property conveyed to Impac Ltd., Inc., by deed from Bob L. Robinson, Trustee, of record in Book 4655, page 818, said Register's Office.

I. The following are the requirements to be complied with:

1. Instruments necessary to create the estate or interest to be insured must be properly executed, delivered and duly filed for record.

By deed in Book 4478, page 782, said property was conveyed to Bob L. Robinson, Trustee, predecessor in title of the above-mentioned owner. We will require proof as to the persons for whom said Robinson was acting as trustee and as to the terms and conditions of his trust with respect to the sale and conveyance of the said property.

II. Schedule B of the policy or policies to be issued will contain exceptions to the following matters unless the same are disposed of to the satisfaction of the Company:

1. Defects, liens, encumbrances, adverse claims or other matters, if any, created, first appearing in the public records or attaching subsequent to the effective date hereof but prior to the date the proposed Insured acquires for value of record the estate or interest or mortgage thereon covered by this Commitment.

2. Standard Exceptions:

(a) Rights or claims of parties in possession not shown by the public records.

(b) Easements, or claims of easements, not shown by the public records.

(c) Encroachments, overlaps, boundary line disputes, or other matters which would be disclosed by an accurate survey or inspection of the premises.

(d) Any lien, or right to a lien, for services, labor, or material heretofore or hereafter furnished, imposed by law and not shown by the public records.

3. Special Exceptions:

(a) Taxes
1973, a lien, but not yet due and payable.
Parcels 6D-60750, 60760 and 60770

(b) Vendor's lien retained in the deed from Robert W. Sturdivant Trustee, to Ronald S. Ligon, et al, of record in Book 4287, page 665, to secure a note dated Nov. 8, 1968, for $27,500.00, payable in 5 annual installments of $5,500.00 each, plus interest at 6% per annum.

Exhibit "C"

Agreement made as of the 18th day of May, 1973 between and among Third National Bank in Nashville, a bank, having its principal place of business at Nashville, Tennessee (the "Temporary Lender"); Impac Limited, Inc. residing at (or having its principal office at) Brentwood,

Tennessee (the "Borrower"), and First and Mid-South Mortgage Company, having its principal place of business in Nashville, Tennessee (the "Permanent Lender"),

WITNESSETH:

Whereas,

1. Heretofore and by agreement in writing dated May 18, 1973 (the "Commitment") made between the Permanent Lender and the Borrower, the Permanent Lender, subject to the terms and conditions set forth in said Commitment, agreed to make a loan to the Borrower in the sum of $700,000.00, or in lesser sums as specified in said Commitment if certain of the requirements were not met, to be secured by a first mortgage or deed of trust upon the fee simple title to certain real property and the improvements thereon existing and/or to be built, described as follows:

Land in Davidson County, Tennessee, being Lots Nos. 8, 9 and 10 on the unrecorded Map of South Brentwood, in the 6th Civil District of said County described as follows:

Beginning at the southeast corner of Wilson or Harpeth Pike and Frierson Street, formerly Elm Street; thence running southerly with the easterly margin of said Pike 300 feet to a point; thence in an easterly direction in a line parallel with the southerly margin of Elm Street 180 feet to the westerly margin of an alley; thence in a northerly direction with the westerly margin of said alley 300 feet to a point in the southerly margin of Elm Street; thence in a westerly direction with the southerly margin of said street, 180 feet to the point of beginning.

and

2. The Commitment anticipates that the Borrower will require interim or construction financing and that an agreement is to be executed in form and substance satisfactory to the Borrower, Temporary Lender and Permanent Lender, pursuant to which such interim Lender (Temporary Lender) shall agree to sell, assign and transfer to the Permanent Lender (but subject nevertheless to compliance with all of the terms, provisions, covenants and conditions of the Commitment hereinabove referred to) any building loan note and mortgage (or deed of trust) executed and delivered by the Borrower to such interim lender; and

3. The Temporary Lender and the Borrower have entered into one or more agreements to provide the Borrower with certain funds to be used in connection with the construction of improvements upon the land described in the Commitment, and pursuant to such Building Loan Agreement (or however said agreements are styled) the Borrower has executed and delivered a note or notes (collectively, the "Building Loan Note") in the sum of $700,000.00, bearing interest at the rate of 8½% per annum, said Building Loan Note being secured by a deed of trust or mortgage (the "Building Loan Mortgage") upon the aforesaid real property. Interest rate is subject to increase as therein set out.

Now, therefore, in consideration of the reciprocal undertakings of the parties and for other good and valuable considerations, the receipt whereof is hereby acknowledged, the parties hereto agree as follows:

FIRST: PURCHASE AND SALE. The Temporary Lender agrees to sell to the Permanent Lender and, subject to compliance with all of the terms and conditions of the Commitment and of this Agreement, the Permanent Lender agrees to purchase from the Temporary Lender

the Building Loan Note and the Building Loan Mortgage. The Permanent Lender agrees to pay the Temporary Lender for the Building Loan Note and the Building Loan Mortgage the aggregate unpaid balance of the Temporary Lender's principal advances under the Building Loan Agreement at the time of purchase of said note, in no event, however, to exceed the sum of $700,000.00, or if certain of the requirements of said Commitment shall not have been fulfilled, then in such lesser amounts as therein specified; and the Temporary Lender will assign the Building Loan Note and the Building Loan Mortgage to the Permanent Lender by an assignment in form and substance satisfactory to the Permanent Lender. While such assignment may be made without warranty by or recourse to the Temporary Lender, it is agreed that same is to be accompanied by a binding representation by the Temporary Lender, upon which Permanent Lender will rely, and the estoppel statement of the Borrower as to the unpaid indebtedness and interest thereon (including accrual date), and Borrower shall further agree at such time that there are no defenses or offsets to the payment of said indebtedness and interest.

SECOND: CLOSING. The closing of the purchase and sale of the Building Loan Note and the Building Loan Mortgage shall take place at the office of the Temporary Lender or at such other place as the Temporary Lender and the Permanent Lender may agree.

THIRD: MODIFICATION AND EXTENSION AGREEMENT. At time of the closing of the permanent loan the Borrower shall execute and deliver such modification and extension of the Building Loan Note and the Building Loan Mortgage (which modification and extension may be accomplished by the execution and delivery of a new note and mortgage (or deed of trust) by the Borrower) as may be required to conform the terms thereof to the terms of the Commitment, and such other documents as are provided to be executed and delivered by the Borrower in accordance with the provisions of the Commitment, all in form and substance satisfactory to the Permanent Lender, and shall otherwise perform and observe all of the requirements of the Commitment on the part of the Borrower to be performed and observed.

FOURTH: RESTRICTION ON SALE OF BUILDING LOAN NOTE AND BUILDING LOAN MORTGAGE. Prior to the expiration of the commitment or any extension thereof, the Temporary Lender agrees (1) not to release any part of the security for its loan; (2) not to accept prepayment (except to the extent required to reduce the unpaid balance of the Building Loan Note to an amount equal to the agreed purchase price; (3) not to accelerate the maturity of the indebtedness; and (4) not to assign or transfer said loan (except to the Permanent Lender pursuant to the commitment). In the event of default by Borrower, however, Temporary Lender may do any one or more of said above numbered acts but not sooner than twenty days after the Permanent Lender has received notice advising of such default. If within said twenty-day period the Permanent Lender agrees in writing with the Temporary Lender to purchase the loan notwithstanding such default, then the Temporary Lender's agreement not to release, accept prepayment, accelerate or assign, as above, shall, simultaneously with the execution of such written agreement, be reinstated. The provisions hereof are subject to any requirement of law that the disposition of the assets of the Temporary Lender shall at all times be and remain within its control. The Borrower hereby confirms and consents to all of the above and promises that Borrower will not accept a first mortgage loan upon

the aforesaid real property from any other lender before the termination of the Commitment by the Permanent Lender.

FIFTH: TERMINATION. The parties hereto agree that although the Commitment bears a date of termination, such termination is actually only at the option of the Permanent Lender herein, and Permanent Lender reserves the right unilaterally to extend the commitment date at any time within thirty days following such stated termination. The Borrower and Temporary Lender agree that said Commitment shall remain in full force and effect for all the purposes of this agreement until thirty days following said termination date or such later date as Permanent Lender shall indicate in writing (in the manner provided for notices in this agreement) during said thirty-day period.

SIXTH: NOTICES. All notices, demands and requests hereunder shall be in writing and shall be deemed to have been properly given if sent by United States registered mail, postage prepaid, addressed to the parties at the respective addresses set forth at the beginning of this agreement, or at such other address as any of the parties may from time to time designate by written notice given as herein required. Notices, demands and requests given in the manner aforesaid shall be deemed sufficiently served or given for all purposes hereunder two days following the time such notice, demand or request shall have been deposited in any Post Office or Branch Post Office regularly maintained by the United States government.

SEVENTH: DEFINITIONS. As used herein, the term "note" shall mean a note or a bond, and the term "mortgage" shall mean a mortgage or a deed of trust, as the Permanent Lender shall require.

EIGHTH: NO ORAL MODIFICATION. This agreement may not be changed, terminated or modified orally or in any manner other than by an agreement in writing signed by the parties hereto.

NINTH: BINDING EFFECT. The covenants, agreements, rights and options contained in this agreement shall be binding upon and shall inure to the benefit of the respective heirs, executors, successors and assigns of the parties hereto and all persons claiming by, through or under any of them.

TENTH: CONSTRUCTION OF AGREEMENT. This agreement shall be construed in accordance with the laws of the state where the above real estate is located.

This agreement shall bind and inure to the benefit of the successors and assigns of the parties hereto.

Third National Bank in Nashville
By: /s/ York Lillie, Jr. c/a

Impac Limited, Inc.
By: /s/ James K. Wall
/s/ F. Murray Parker

First and Mid-South Mortgage Co.
By: /s/ Willie K. Davis, Ex. V.P.

Exhibit "D"

FIRST AND MID-SOUTH MORTGAGE COMPANY
P. O. Box 2568
Nashville, Tennessee
615/254-5401

May 30, 1974

Mr. F. Murray Parker
Mr. James K. Wall
Peach Court
Brentwood, Tennessee 37027

Re: First Mortgage Loan—$800,000
Impac Limited, Inc., Mortgagor
Wilson Pike Circle, Davidson County
Brentwood, Tennessee
Brentwood Plaza Office Building

Gentlemen:

First and Mid-South Mortgage Company agrees to make a first mortgage loan on the above captioned property in the amount of $800,000 for a minimum term of 25 years. The interest rate will be the competitive market rate at the time the borrowers desire to use this commitment to take out the construction lender. The competitive rate today for a loan on this type property is 9-3/8% to 9-1/2%.

The loan amount of $800,000 is subject to and contingent upon the leasing of at least 22,544 sq. ft. of the proposed building. This space must be rented for terms of at least 3 years and at rates of not less than $6.25 per square foot per year which will produce $140,900 annual rental income, evidenced by copies of valid lease agreements satisfactory to this company. In the event

this leasing requirement is not attained prior to the expiration of this commitment, the loan will be closed at the reduced amount of $656,000.

This commitment is issued subject to the following conditions:

1. The loan is to be secured by a valid first lien on the fee simple title to property located in Davidson County, Tennessee, being Lots 8, 9, & 10 on the unrecorded Map of South Brentwood, in the 6th Civil District of said County. The property fronts 300 feet on Wilson Pike and runs back between parallel lines 180 feet each to a line in the rear measuring 300 feet. The deed to Impac, Limited, Inc., is recorded in Book 4655, page 818, Register's Office, Davidson County, Tennessee.

2. All legal fees and other expenses in connection with the closing of this loan are to be paid by the mortgagor.

3. Prior to closing, this company must be supplied with a survey showing no encroachments other than those approved by us and showing the building to be within lot and building lines.

4. We are to be furnished with a mortgagee's title insurance policy issued by a company approved by us.

5. Mortgagor is to furnish satisfactory proof of compliance with any and all applicable laws, regulations and zoning requirements.

6. Fire and extended coverage insurance policies are to be furnished in an amount not less than the full insurable value of the improvements, issued by companies satisfactory to us.

7. Applicant agrees to furnish, if applicant is a corporation or partnership, all appropriate papers, attorney's opinions and legal documents evidencing applicant's capacity, legal authority, good standing and the qualifications of signers to execute the loan instruments and to engage in any transaction or business in connection with which the loan is made.

8. We will require a general assignment of the rent to First and Mid-South Mortgage Company in case of default on the monthly payments.

9. The loan documents shall contain the following items or provisions:

(a) Installments shall be due and payable on the first day of each month.

(b) The holder may collect a "late charge" not to exceed an amount equal to 4% on any installment which is not paid within 15 days of the due date thereof, to cover the extra expense involved in the handling of delinquent payments, provided that collection of said late charges shall not be deemed a waiver by the holder of any of its other rights under the note.

(c) The mortgagee is to be furnished with a certified, itemized statement of annual income and expenses on the property covered by this loan, within 90 days following the end of each fiscal or calendar year.

(d) Proper covenant requiring monthly escrow deposits for payment of real property taxes and hazard insurance premiums.

10. Prior to closing the loan, the improvement must be built and completed in accordance with the plans and specifications which are to be submitted to us for approval.

11. This commitment shall expire July 31, 1975, 60 days notice to fund.

12. Upon acceptance of this commitment, you are to forward a check in the amount of $12,000 as a non-refundable commitment fee to First and Mid-South Mortgage Company. However, if First and Mid-South's obligation under this commitment is removed within 1 year from the date of this letter, then First and Mid-South will refund $4,000 to the borrower.

We appreciate your offering us the opportunity to make this loan and trust that it will be handled to your entire satisfaction. Please accept and return to our office, with the proper deposit, no later than May 31, 1974.

Very truly yours,

/s/ John A. Thweatt
John A. Thweatt
Vice President

/s/ Willie K. Davis
Willie K. Davis
President

JAT:jy

Accepted this 31st day of May, 1974.

Impac Limited, Inc.

By: /s/ F. Murray Parker

Exhibit "E"

FIRST AND MID-SOUTH MORTGAGE COMPANY
Established 1935
P. O. Box 2568
Nashville, Tennessee
615/254-5401

May 12, 1975

Mssrs. F. Murray Parker
and James K. Wall
Parker Builders
Brentwood, Tennessee 37027

Re: Brentwood Plaza
Brentwood, Tennessee

Gentlemen:

On May 9th, we carried a representative of Northwestern Mutual Life Insurance Company by the subject property. He had expressed an interest in this loan and this was the purpose for his trip to Nashville. Upon our inspection of the property, several matters were brought to my attention and I think it is to your benefit that I pass them on to you.

First, even though the building is very attractive, it gives an unfinished appearance. The areas between the parking lot and streets and the area in back of the building have not been cleaned up and landscaped. The concrete in the entrance needs to be cleaned. Secondly, the floor in the foyers needs to be better maintained or waxed and buffed more often.

The downstairs office space was impressive, however, comment was made as to the blond office doors upstairs

not looking as good as dark stained doors and they also show scratch marks easier.

The crowded parking condition was also noticeable due to the fact that the parking lot was almost full and yet the building was not fully occupied. I pointed out that this was due to the employee density of Cosmopolitan. Also in regard to this matter, the plans and specifications call for 112 parking spaces and there are only 105 spaces provided.

The reason that I am bringing these things to your attention is twofold. First, I need all the help I can get in selling this loan; and secondly, I feel that prospective tenants might raise these same objections.

Your competition is going to get stiffer than it is now, and if you can make these corrections, I feel that you can meet this competition because you have a good project in a good location.

I will try to get by your office to further discuss these matters within the next few days.

Very truly yours,

/s/ John
John A. Thweatt
Vice President

JAT:dm

Exhibit "F"

FIRST AND MID-SOUTH MORTGAGE COMPANY
Established 1935
P. O. Box 2568
Nashville, Tennessee
615/254-5401

July 8, 1975

Messrs. F. Murray Parker
and James K. Wall
c/o F. Murray Parker Builders, Inc.
Box 766
Brentwood, Tennessee 37027

Re.: Brentwood Plaza Office Building

Gentlemen:

This letter is to confirm my phone conversation with Tom Smith on July 3, 1975, that our attorney will run the title check for the mortgage title policy. In order that this can be done, I have asked that the as built survey be given first priority and that the survey should show the adjoining lot and the additional parking space.

You are also asked to send, for our approval, a copy of the lease or deed to the adjoining land used for parking.

If you need further explanations of these matters, please call.

Yours very truly,

/s/ John A. Thweatt
John A. Thweatt
Vice President

JAT:dm

Exhibit "G"

Nashville Record, Tues., September 23, 1975

NOTICE OF FORECLOSURE

WHEREAS, Impac Limited, Inc., by a Deed of Trust dated May 18, 1973, of record in Book 4710, page 250, Register's Office of Davidson County, Tennessee, conveyed to Pryor York Lillie, Jr., Trustee, the hereinafter described property to secure the payment of a Promissory Note more fully described in said Deed of Trust, which note is presently held and owned by Third National Bank in Nashville; **and**

WHEREAS, demand has been made for the payment of the aforesaid note secured by the above-described Deed of Trust, which note is in default; and

WHEREAS, Third National Bank in Nashville, the owner and holder of said note has demanded that the property be advertised and sold in satisfaction of said indebtedness and the costs of foreclosure, in accordance with the terms of said note and of the Deed of Trust; and

WHEREAS, the undersigned Thomas P. Kanaday, Jr. has been duly appointed as Substitute Trustee in the place and stead of Pryor York Lillie, Jr., Trustee, said appointment being set forth in Book 4952, page 132, Register's Office of Davidson County, Tennessee.

NOW, THEREFORE, notice is hereby given that I, Thomas P. Kanaday, Jr., Substitute Trustee, pursuant to the power, duty and authority vested in and imposed upon me in the above-described Deed of Trust, will on

at 12 o'clock noon, at the south door of the Davidson County, Courthouse, in Nashville, Tennessee, offer for sale to the highest and best bidder for cash and free of the equity of redemption, homestead, dower, and all other exemptions as provided in said Deed of Trust, certain real property situated in Davidson County, Tennessee, described as follows:

Being Lots Nos. 8, 9, and 10 on the unrecorded Map of South Brentwood, in the 6th Civil District of said County, described as follows: Beginning at the southeast corner of Wilson and Harpeth Pike and Frierson Street, formerly Elm Street; thence running southerly with the easterly margin of said Pike 300 feet to a point; thence in an easterly direction in a line parallel with the southerly margin of Elm Street 180 feet to the westerly margin of an alley; thence in a northerly direction with the westerly margin of said alley 300 feet to a point in the southerly margin of Elm Street; thence in a westerly direction with the southerly margin of said street, 180 feet to the point of beginning.

Being the same property conveyed to Impac Ltd., Inc., by deed from Bob L. Robinson, Trustee, of record in Book 4655, page 318, said Register's Office.

Said sale will be subject to any and all unpaid taxes that may be a lien against the property and subject to any and all other liens, if any, which take priority over

the Deed of Trust upon which this foreclosure sale is had.

THOMAS P. KANADAY, JR.
Substitute Trustee
18th Floor, Third
National Bank Bldg.
Nashville, TN 37219

Ins. Dates: Sept. 23, 30, & Oct. 7, 1975

Ad.No. 381

(Title Omitted in Printing)

SHOW CAUSE ORDER

(Filed September 26, 1975)

Upon petition of Plaintiffs for a restraining order, as set forth in the Complaint filed in this cause, Plaintiffs are granted a restraining order, pending further orders of this Court; and it is

• • •

Defendant, Third National Bank, is ordered to appear before this court on the 14th day of October at 8:30 a.m. and show cause why a temporary injunction should not issue.

This 26th day of September, 1975, at 11:30 a.m.

/s/ Ben H. Cantrell
Chancellor

(Title Omitted in Printing)

ANSWER OF THIRD NATIONAL BANK IN NASHVILLE

(Filed October 7, 1975)

FIRST DEFENSE

The complaint fails to state a claim against this defendant upon which relief can be granted.

SECOND DEFENSE

For answer, Third National Bank in Nashville says:

1. The allegations in pararaph one of the complaint are admitted.

2. The allegations of paragraph two of the complaint are admitted.

3. The first sentence of paragraph three of the complaint is denied; and this defendant would show that Messrs. Wall and Parker (and not First & Mid-South Mortgage Company) directly approached Third National Bank for construction financing. The second sentence of paragraph three of the complaint is denied in that Messrs. Parker and Wall had already obtained from First & Mid-South Mortgage Company a commitment for permanent financing prior to the time that Messrs. Parker and Wall approached Third National Bank for construction financing. The third sentence of paragraph three of the complaint is denied in that the commitment of First & Mid-South Mortgage Company did not constitute "security for the funds extended by Third National Bank". The only security for the loan was a deed of trust upon the real property.

4. This defendant would show the Court that Exhibit A was not appended to the complaint served on it and

that its files do not reflect any document dated January 10, 1973 and, accordingly, this defendant lacks sufficient knowledge or information to either admit or deny the allegations contained in paragraph 4 of the complaint.

5. The allegations of paragraph five of the complaint are admitted, but this defendant would show the Court that it relied on many other factors in making the construction loan to the plaintiffs. Other factors relied upon by this defendant were the credit worthiness of the borrowers, the contemplated feasibility of the project, and the ability of the borrowers to meet the conditions set forth in the commitment of First & Mid-South Mortgage Company.

6. The allegations of the first grammatical paragraph of paragraph six of the complaint are admitted, but this defendant would show the Court that the sole reason for preclosing the permanent loan was to eliminate the expense of additional transfer taxes and title insurance which would otherwise have been borne by the plaintiffs.

Answering the second grammatical paragraph of paragraph six of the complaint, these defendants would show that the terms of the agreement among plaintiffs, Third National Bank and First & Mid-South Mortgage Company speak for themselves. It is denied that said agreement prohibited the plaintiffs from obtaining another first mortgage from other lenders. Specifically, said agreement provides as follows:

> Borrower will not accept a first mortgage loan upon the aforesaid real property from any other lenders before the termination of the commitment by the permanent lenders.

Said commitment by the permanent lenders expired April 30, 1974. Further, this defendant is informed that

First & Mid-South from time to time told plaintiff that they were free to obtain other financing and, accordingly, said restriction was waived.

7. This defendant is informed that the allegations contained in the first two sentences of paragraph seven of the complaint are true except that the commitment to fund in excess of $656,000.00 was based upon meeting certain rental levels which plaintiffs failed to do. This defendant is without knowledge as to the truth of the allegations set forth in the third sentence of paragraph seven of the complaint. The allegations of the fourth and fifth sentences of paragraph seven of the complaint are true.

8. The first sentence of paragraph eight of the complaint is admitted. While this defendant has no knowledge of the remainder of the allegations set forth in the first grammatical paragraph of paragraph eight of the complaint, it is informed and accordingly believes that such allegations are untrue.

Answering the second grammatical paragraph of paragraph eight of the complaint, this defendant is informed and believes that First & Mid-South Mortgage Co. did not add new conditions to its commitment, but would show the Court that plaintiffs had not contemplated the construction of the facility in accordance with the plans and specifications therefor. Among the deficiencies was the failure of plaintiff to provide a sufficient number of parking spaces so as to comply with the plans and specifications. This defendant is without knowledge as to the plaintiffs' ability to purchase adjoining land. However, it is emphatically denied that any portion of the proceeds from the permanent loan were available for the purchase of said land. Specifically, only $656,000.00 of loan proceeds were to be paid from the permanent loan

because plaintiffs had not met the rental requirement necessary to obtain additional funding up to the amount of $800,000.00. In addition, if the plaintiffs had been able to meet rental requirements necessary to receive $800,000.00 in proceeds, $700,000.00 of said sum plus accrued interest and extension fees were to be paid to Third National Bank in payment of the construction loan; $65,000.00 was to be paid to Third National Bank to repay indebtedness incurred in the purchase of the land on which the building was constructed; and $32,557.80 was due and payable to Ray Bell Construction Co., Inc. for the release of its lien filed against the property. Accordingly, no funds were, under any circumstances, available for the purchase of the adjoining real property.

This defendant is informed that the allegations in the third and fourth grammatical paragraphs of paragraph eight of the complaint are untrue.

9. The allegations of paragraph nine of the complaint are specifically denied.

10. Answering paragraph ten of the complaint, this defendant would show the Court that there is due on the loan outstanding to Third National Bank the principal sum of $700,000.00 plus interest at the rate of ten percent (10%) per annum from August 1, 1975, plus an extension fee in the amount of $3,500.00 plus its reasonable attorney fees. This defendant is without knowledge as to the value of the property known as Brentwood Plaza.

11. The allegations of paragraph eleven of the complaint are admitted. However, this defendant would show the Court that in the event that the indebtedness owed to it is paid by plaintiffs prior to 12 o'clock noon, November 7, 1975, no foreclosure sale will be had.

12. This defendant denies the allegations of the first sentence of paragraph twelve of the complaint and would show the Court that the plaintiffs know they they have been in default on the loan since March 14, 1975 by reason of plaintiffs' failure to pay an extension fee from and after that date; that defendants have been in default of the payment of interest from and after August 1, 1975; and that plaintiffs have been in default in the payment of principal from and after September 15, 1975.

Answering the other allegations contained in paragraph twelve of the complaint, this defendant would show the Court that First & Mid-South has failed to honor its commitment because of the failure of the plaintiffs to comply with their obligations thereunder and that this defendant is seeking to foreclose on its security for the sole purpose of effecting the collection of indebtedness due and owing to it.

13. The allegations of paragraph thirteen of the complaint are denied.

14. Allegations not specifically admitted or denied are hereby denied.

Further answering this defendant prays to be dismissed with its reasonable costs in this cause including attorneys fees and expenses as provided in the note and deed of trust executed by the plaintiffs.

/s/ Thos. P. Kanaday, Jr.
Farris, Evans & Warfield
Solicitors for Third National Bank in Nashville
Eighteenth Floor—Third National Bank Building
Nashville, Tennessee 37219

(Title Omitted in Printing)

AFFIDAVIT OF PAUL J. BROWN

(Filed October 14, 1975)

STATE OF TENNESSEE)
)
COUNTY OF DAVIDSON)

The undersigned, PAUL J. BROWN, being duly sworn, deposes and says:

1. I am a Commercial Officer of Third National Bank in Nashville (Third National) and my principal responsibility relates to construction lending on commercial real estate.

2. Since the spring of 1973, I have handled the loan to Impac Limited, Inc. A true copy of the note is appended hereto as Exhibit A. A true copy of the deed of trust is appended hereto as Exhibit B. A true copy of a certain agreement dated May 18, 1973 among Third National Impac Limited, Inc., and First and Mid-South Mortgage Company is appended hereto as Exhibit C.

3. In the making of its loan to plaintiffs, Third National relied upon, among other things, the commitment of First and Mid-South, the deed of trust securing the debt, the anticipated feasibility of the project, and the credit worthiness and integrity of the borrowers.

4. A true copy of the original commitment issued by First and Mid-South is attached hereto as Exhibit D. Said commitment expired April 30, 1974. Another commitment, a true copy of which is attached as Exhibit E, was issued by First and Mid-South on May 30, 1974

and expired on July 31, 1975. To the best of my knowledge, no additional commitments have been made by First and Mid-South to plaintiffs.

5. Third National's original loan for construction financing matured on May 30, 1974. However, upon receipt of an extension fee, Third National extended the loan until December 2, 1974. I am informed and believe that most of the construction of the office building was completed prior to December 2, 1974 but that some substantial finishing work remained at that time. Plaintiffs sought an additional extension of the loan until March 14, 1975 which was granted upon payment of an extension fee. Third National's commitment to carry the loan expired on March 14, 1975. Although Third National agreed to extend the loan until July 31, 1975, plaintiffs failed to pay the agreed upon extension fee. In fact, Third National even agreed, at plaintiffs' request, to accept such fee on a monthly basis. No fee whatsoever was paid to Third National for an extension after March 14, 1975.

6. While Third National had no obligation to carry the loan for plaintiffs after March 14, 1975, it continued to extend the credit until July 31, 1975 with a view toward plaintiffs' meeting the conditions of the First and Mid-South commitment which expired on July 31, 1975. In fact, by letter dated May 16, 1975, I informed plaintiffs of their obligation to give notice to First and Mid-South. A copy of that letter is attached as Exhibit F.

7. In order to protect its own financial interest as well as the financial interest of the plaintiffs, Third National has made substantial efforts to ascertain whether plaintiffs complied with the terms and condtions of the First and Mid-South commitment which is set forth in

Exhibit E. Third National is informed that plaintiffs failed to comply with the following requirements by that commitment:

(a) There is substantial doubt as to whether Third National's deed of trust (see Exhibit B) is a first lien on the property because of the mechanic's lien in the amount of $32,557.80 filed by Ray Bell Construction Company, Inc. which claims that it commenced construction prior to the recording of the deed of trust. (See Item 1 of Commitment).

(b) No survey was furnished by July 31, 1975. (See Item 3 of Commitment).

(c) A certificate of occupancy was not issued by the Metropolitan Department of Codes Administration until September 22, 1975. (See Item 5 of Commitment).

(d) No assignment of rents was executed. (See Item 8 of Commitment).

(e) The improvements were not completed in accordance with the plans and specifications. Specifically, there was a deficiency of eight parking spaces and certain mechanical and other work was not completed in the bathrooms. There were other material deficiencies in construction. (See Item 10 of Commitment).

8. On August 28, 1975 I called a meeting to find out if there was any way whereby plaintiffs could then comply with the conditions of the First and Mid-South commitment as I knew that First and Mid-South had indicated some willingness to reinstate the commitment. Present at the meeting were John Thrweatt (First and Mid-

South), Willie K. Davis (First and Mid-South), James K. Wall, and Thomas Smith (a representative of the plaintiffs). At this meeting Mr. Davis stated and Mr. Wall then acknowledged that First and Mid-South was under no obligation to honor its expired commitment. I asked Mr. Wall if the building was in a condition to be delivered in accordance with the requirements of the commitment. Mr. Wall responded: "You know I can't". I also informed Mr. Wall that without payment of the Third National loan, it had no other alternative than foreclosure. In essence, Mr. Wall stated that he and Mr. Murray Parker had been negligent in handling the project; that they had "drug their feet"; and that Third National had no other course to follow.

9. In an effort to assist plaintiffs, Third National has repeatedly granted them extensions. As a matter of its policy, Third National has attempted to grant plaintiffs every commercially reasonable consideration to avoid foreclosure but plaintiffs' own course of action (or inaction) is the sole cause of the foreclosure.

10. Plaintiffs have been in default in paying the extension fee since March 15, 1975; in default in the payment of interest since August 1, 1975; and in default in the payment of principal since September 15, 1975. A true copy of the letter demanding full payment is attached hereto as Exhibit G.

/s/ Paul J. Brown
Paul J. Brown

I, Paul J. Brown, make oath that I have assisted in the preparation of the foregoing affidavit; that I have read it fully; and that it is true to the best of my knowl-

edge, except as to matters stated on information which matters I believe to be true. Executed October 13, 1975.

/s/ Paul J. Brown
Paul J. Brown

Sworn to and subscribed before me, this October 13, 1975.

/s/ Dorothy E. Owen
(Seal) Notary Public
My Commission Expires February 2, 1977.

:ED OF TRUST NOTE

THIRD NATIONAL BANK - IN NASHVILLE

$ 700,000.00 *Nashville, Tenn.,* May 18, 19 73

On Demand Impac Limited, Inc. *promise to pay to the order of*

THIRD NATIONAL BANK IN NASHVILLE

Seven Hundred Thousand and no/100---------- *DOLLARS*

with interest at 8½ *per cent per annum, for value received.*

This note is secured by deed of Trust of even date herewith on Lots Nos. 8, 9 and 10 on the unrecorded Map of South Brentwood, in the 6th Civil District of Davidson County, Tennessee.

And it is expressly understood and agreed by all parties hereto that if it is necessary to enforce payment of this note through an attorney or by suit, debtors shall pay reasonable attorney's fees and all costs of collection.

IMPAC LIMITED, INC.

By: F. Murray Parker

James K. Wall

*No.*_____

Exhibit A 42

THIS INSTRUMENT WAS PREPARED BY

Paul Brown

BOOK 4710 PAGE 250

Deed of Trust

Return to:
THIRD NATIONAL BANK

THIRD NATIONAL BANK
201 - 4th Ave., No.
Nashville, Tenn. 37219

FOR AND IN CONSIDERATION of One Dollar to it *paid, the receipt of which is acknowledged, and the other considerations hereinafter mentioned,* Impac Limited, Inc.

has does
~~have~~ *this day bargained and sold, and do hereby*

transfer and convey, to Pryor York Lillie, Jr. *Trustee, and his successors in trust,*

certain property in the State of Tennessee, Davidson *County, described as follows, to-wit:*

Land in Davidson County, Tennessee, being Lots Nos. 8, 9 and 10 on the unrecorded Map of South Brentwood, in the 6th Civil District of said County described as follows:

Beginning at the southeast corner of Wilson or Harpeth Pike and Frierson Street, formerly Elm Street; thence running southerly with the easterly margin of said Pike 300 feet to a point; thence in an easterly direction in a line parallel with the southerly margin of Elm Street 180 feet to the westerly margin of an alley; thence in a northerly direction with the westerly margin of said alley 300 feet to a point in the southerly margin of Elm Street; thence in a westerly direction with the southerly margin of said street, 180 feet to the point of beginning.

Being the same property conveyed to Impac Limited, Inc., by deed from Bob L. Robinson, Trustee, as of record in Book _____, Page _____, said Register's Office for Davidson County.

MAY24	MTGTX	*	$700,000.00		
MAY24	STAX		A* 698.00		
MAY24	PRFEE		A* .50		
MAY24	DEED		A* 4.00	*	702.50

TO HAVE AND TO HOLD said property to the said Pryor York Lillie, Jr.

Trustee, and his successor in trust, forever it *covenant that* it is *lawfully seized of the said property, have a good right to convey it, and that the same is unencumbered.*

It *further covenant and bind* its successors ~~heirs~~ *and representatives, to warrant and defend the title to said property to the said* Pryor York Lillie, Jr. *Trustee and his successor in trust, and his assigns, forever, against the lawful claims of all persons.*

But this conveyance is made IN TRUST for the following uses and trusts, and for no other purposes, to-wit:

To secure the payment of a note of even date herewith in the principal sum of Seven Hundred Thousand and no/100 ($700,000.00) Dollars, executed by Impac Limited, Inc., and payable to the order of Third National Bank in Nashville and delivered for the purpose of securing borrowed money. Said note is payable on Demand and bears interest at the rate of 8½% per annum.

As part of the consideration for the execution of this instrument, and of the indebtedness secured hereunder, the undersigned agree to keep all buildings now on, or to be hereafter erected on said property, insured in some reliable fire insurance company, or companies, for the sum of $ ..... , or at least the maximum insurable value, until the indebtedness herein secured is fully paid, and to have the loss, if any, made payable on the policy, or policies, to said trustee for the benefit of the lawful owner or holder of said indebtedness as his interest may appear.

Exhibit B

Undersigned further agree to pay all taxes and assessments thereon, general or special, and to pay them when due, and, upon demand of said trustee or the lawful owner and holder of said indebtedness, to pay, discharge, or remove, any and all liens which may be hereafter placed against said property and which shall adversely affect the lien of this instrument or enforcement of the terms and provisions hereof; to keep the improvements on said property in good repair and preservation, and in case the trustee or his successors or the lawful owner and holder of said indebtedness shall hereafter be required to appear in any court or tribunal to enforce this deed of trust or the terms thereof, or to defend the title to, or possession of, said property, or the lien of this instrument, or appear in any court to prove the above indebtedness, all the costs and expenses of such appearance or proceedings, together with a reasonable attorneys fee, shall be allowed, and if paid by the trustee or the lawful owner and holder of said indebtedness, shall bear 6 percent interest from the date of payment and shall be and become a part of the indebtedness secured hereby.

Now, if the undersigned grantors shall pay said indebtedness, and all installments thereof, when due, according to the terms hereof, or of any note or notes evidencing the same, and pay taxes, keep up repairs, keep said premises insured, and performs the other and foregoing obligations and agreements, then this trust conveyance shall be of no further force or effect. But if grantors fail to pay said indebtedness, or any part or installment thereof, promptly at maturity, or if, failing to pay taxes, keep up repairs, keep said premises insured, or perform said other obligations and agreements as herein provided, grantors fail to reimburse the Trustee or lawful owner and holder of said indebtedness for all sums, with interest, so expended by said Trustee, or lawful owner and holder of said indebtedness, within thirty days from date of such payment, this trust conveyance shall remain in full force and effect, and at the option of the lawful owner and holder of said indebtedness or part or installments thereof then past due and unpaid, all remaining unpaid indebtedness shall become due and payable at once, without notice, and the said trustee, or his successor in trust, is hereby authorized and empowered, upon giving twenty days' notice by three publications in any newspaper, daily or weekly, published in Davidson County, Tennessee, to sell said property at the front door of the Court House in said county to the highest bidder for cash, at public outcry, free from the equity of redemption, homestead, dower and all other exemptions of every kind, which are hereby expressly waived; and the said trustee or his successor in trust, is authorized and empowered to execute and deliver a deed to the purchaser. The creditor may bid at any sale under this trust conveyance. Grantors agree that the trustee may, at any time after default in the payment of any part of said indebtedness, enter and take possession of said property, and shall only account for the net rents actually received by him. Grantors further agree that, in the event the Trustee fails, before selling said property as herein provided, to enter and take possession thereof, the purchaser shall be entitled to immediate possession thereof upon the delivery to him by the trustee of a deed for said property.

In event of the death, absence, inability, or refusal to act of the said trustee at any time when action under the foregoing powers and trust may be required, the owner of the debt herein secured is hereby authorized to name and appoint a successor to execute this trust, and the title herein conveyed to the above named trustee shall be vested in said successor.

In the event of a sale of said property under and by virtue of this trust, the grantors and all persons holding under them shall be and become the tenants at will of the purchaser from and after the execution and delivery of a deed to such purchaser, said tenancy to be determined at the option of said purchaser upon five days written notice.

Upon any sale under this Deed of Trust, the proceeds will be applied by the Trustee:

First:—To pay all the costs and charges of executing this trust, including attorney's fees and the expenses of any litigation which may arise on account of the execution and enforcement of this trust, or in connection therewith as above provided.

Second:—To pay said debt, or any balance thereof then remaining unpaid.

Third:—The residue to be paid to grantors, or their order.

Witness our hand s this 18th day of May, 1973, the corporate party, if any, having caused its name to be signed hereto by its duly authorized officers on said day and date.

IMPAC LIMITED, INC.

By: F. Murray Parker
F. Murray Parker

James K. Wall
James K. Wall

STATE OF TENNESSEE }
COUNTY OF DAVIDSON }

Personally appeared before me, ... a Notary Public in and for said County and State, ...

the within named bargainor....., with whom I am personally acquainted, and who acknowledged that..... executed the within instrument for the purposes therein contained.

Witness my hand and official seal at..... Tennessee, this.....day of....., 19.....

.....Notary Public

Commission expires.....

STATE OF TENNESSEE }
COUNTY OF DAVIDSON }

Before me, Paul J. Brown, a Notary Public of the State and County aforesaid, personally appeared F. Murray Parker and James K. Wall, with whom I am personally acquainted, and who, upon oath, acknowledged themselves to be Secretary-Treasurer & President of the Impac Limited, Inc., the within named bargainor, a corporation, and that they as such Secretary-Treasurer & President, being authorized so to do, executed the foregoing instrument for the purpose therein contained, by signing the name of the corporation by themselves as Secretary-Treasurer & President.

Witness my hand and seal, at office in Nashville, Tennessee, this 18th day of May, 1973.

Paul J. Brown
Notary Public

Commission expires 5-5-76

Return to:
THIRD NATIONAL BANK

DEED OF TRUST

FROM
Impac Limited, Inc.

TO
Bryor York Lillie, Jr., Trustee
THIRD NATIONAL BANK IN NASHVILLE

C07919

IDENTIF. REFERENCE

MAY 24 9 32 AM '73

FELIX Z. WILSON III REGISTER
DAVIDSON COUNTY, TENN.

Compliments of
Chicago Title Insurance Company
S. W. Corner Third & Union
Phone 256-2656
NASHVILLE, TENNESSEE 37201

Exhibit C

Agreement (Filed as Exhibit C to Complaint).

Exhibit D

Letter Dated January 30, 1973 (Filed as Exhibit A to Complaint).

Exhibit E

Letter Dated May 30, 1973 (Filed as Exhibit D to Complaint).

Exhibit F

May 16, 1975

Mr. F. Murray Parker
Mr. James K. Wall
P. O. Box 366
Brentwood, Tennessee 37027

Re: Brentwood Plaza Office Building
Brentwood, Tennessee

Gentlemen:

Our records indicate that the permanent commitment on the above captioned project will expire July 31, 1975. Item 11 of said commitment requires 60 days notice be given for funding.

This letter is to remind you of the 60 day requirement and to further inform you that we look forward to its funding so that we may be taken out. Should you have any questions, please do not hesitate to call upon me at any time.

Very truly yours,

Paul J. Brown
Commercial Officer

PJB:cjr

cc: Mr. Bill Davis
First & Mid-South Mortgage Co.

Exhibit G

FARRIS, EVANS & WARFIELD
Eighteenth Floor
Third National Bank Building
Nashville, Tennessee 37219
Telephone (515) 244-5200

September 4, 1975

Impac Limited, Inc.
c/o F. Murray Parker and
James K. Wall
P.O. Box 766
Brentwood, Tennessee 37027

Re: Brentwood Plaza Office Building

Gentlemen:

This firm represents Third National Bank in Nashville which has referred to us for collection your promissory note, dated May 18, 1973, in the original principal amount of $700,000. In addition to the principal indebtedness, there remains due and payable accrued interest from August 1, 1975. Also, an extension fee of $3,500 is owed for extending the maturity of this note to July 31, 1975.

If this note is not paid in full, including interest and extension fees, by September 15, 1975, it will be necessary to commence foreclosure proceedings under the deed of trust of record in Book 4710, page 250, Register's Office of Davidson County, Tennessee.

Yours very truly,

Farris, Evans & Warfield
/s/ TK
Thomas P. Kanaday, Jr.
dc

(Title Omitted in Printing)

AFFIDAVIT OF CHARLES W. COOK, JR.

(Filed October 14, 1975)

STATE OF TENNESSEE)
)
COUNTY OF DAVIDSON)

The undersigned, CHARLES W. COOK, JR., being duly sworn deposes, as follows:

1. I am a Senior Vice President of Third National Bank in Nashville, and am in charge of all real property lending. Paul J. Brown reports to me.

2. On August 7, 1975, while Mr. Brown was out of town, Don Lockmiller, a Third National Bank employee, and I met with James K. Wall and a person whom I believe was Tom Smith, an employee of Mr. Wall. The purpose of the meeting was to consider what could be done, if anything, to get the Brentwood Plaza property in sufficient condition to comply with the First and Mid-South commitment, if it could be extended.

3. At no time during the course of the meeting did either Mr. Wall or Mr. Smith indicate that they had been frustrated by Third National Bank or First and Mid-South Mortgage Company, nor did Mr. Wall or Mr. Smith suggest in any way that First and Mid-South had altered or added to its commitment.

/s/ Charles W. Cook Jr.
Charles W. Cook, Jr.

I, CHARLES W. COOK, JR., make oath that I have read the foregoing affidavit, and that it is true. Executed October 13, 1975.

/s/ Charles W. Cook Jr.
Charles W. Cook, Jr.

Sworn to and subscribed before me, this October 13, 1975.

/s/ Dorothy E. Owen
(Seal) Notary Public
My Commission Expires February 2, 1977.

(Title Omitted in Printing)

AFFIDAVIT

(Filed October 14, 1975)

My name is John A. Thweatt. I am Vice-President of First and Mid-South Mortgage Company, one of the Defendants in this cause. I am thirty-eight (38) years of age, reside at 3600 Hillsboro Road, Nashville, Davidson County, Tennessee, and have been with First and Mid-South Mortgage Company for ten (10) years and have been a Vice-President for five (5) years. I was the main officer at First and Mid-South Mortgage Company involved with securing financing for the Brentwood Plaza Office Building, the real estate improvement involved in this cause.

First and Mid-South Mortgage Company has at all times been ready, willing, and able to honor all previous commitments made to the Plaintiffs at such time as said Plaintiffs met all the terms and conditions spelled out in said commitment. I and the others involved in this transaction have done all we possibly could to get the Plaintiffs to realize the various requirements that had to be met so that the commitment could be honored, but the Plaintiffs have been unable, unwilling, or simply refused to accept the importance of said conditions and have not fulfilled them.

The Plaintiffs first came to me about a loan in late 1972. On January 30, 1973, a commitment for a first mortgage loan of Seven Hundred Thousand and 00/100 ($700,000.00) Dollars for the Brentwood Plaza Office Building was given to the Plaintiffs by First and Mid-South Mortgage Company and accepted by them on April 2, 1973. That commitment expired on April 30, 1974. First and Mid-South Mortgage Company made this commitment at a reduced fee as an accommodation to the Plaintiffs so that the Third National Bank, a Co-Defendant in this cause, would make the Plaintiffs a construction loan. First and Mid-South Mortgage Company was requested to make this "stand-by" commitment to the Plaintiffs, by the Plaintiffs, so that they might get this construction loan from the Third National Bank. This was supposed to be a pre-closed loan for the convenience of the Plaintiffs, but we never saw the Note and Deed of Trust; and they would have been unsatisfactory to us or any other investor. Said Note and Deed of Trust did not embody the terms and conditions spelled out in our commitment of January 30, 1973, but would have been satisfactory for a construction loan. Such items as the interest rate, the monthly payment, and other various terms were not spelled out in said document. The Plaintiffs and the Third National Bank executed a construction loan agreement and we also entered into what is commonly known in the trade as a "buy-sell" agreement saying we would buy the loan when the improvements were completed and all terms and conditions of our commitment were met.

Our commitment of January 30, 1973, expired on April 30, 1974, and as an accommodation to the Plaintiffs, we made them a new commitment dated May 30, 1974. This commitment was for Eight Hundred Thousand and 00/100 ($800,000.00) Dollars with a higher interest rate and a

higher rental requirement to justify the higher loan. This commitment was accepted on May 31, 1974; but as far as I am aware, no new papers were executed with the Third National Bank on this new commitment, the previous commitment having expired. All during the last half of 1974 and first half of 1975, we made many attempts to interest permanent investors in this loan; but because of generally unsatisfactory appearance due to poor upkeep and an over-crowded parking condition, we were unable to get a great deal of response except one investor was fairly interested in it. We passed on to the Plaintiffs some of the comments we received from these permanent investors in the hope that it would instill in the Plaintiffs the desire to bring their project up to an acceptable basis for a permanent investor.

At no time did we require any additional conditions in excess of those conditions expressed as terms and conditions of our May 30, 1974, commitment for Eight Hundred Thousand and 00/100 ($800,000.00) Dollars. We did offer suggestions and called to the attention of the Plaintiffs that they were short eight (8) parking spaces called for on the plans and specifications and indicated that one of the ways of solving such a shortage would be to use some of the property next door, which I understood would be available to them. At no time did I ever indicate that anything further than the terms and conditions of our commitment were required.

Approximately seventy-five (75) days prior to the expiration date of our commitment on July 31, 1975, the Third National Bank gave notice to the Plaintiffs that they should notify us that they intended to use our commitment even though we had not entered into a "buy-sell" with the Third National Bank covering this commitment.

Even in spite of the above warning by the Third National Bank, the Plaintiffs did not give notice of their decision to exercise the "standby" commitment within the time required, sixty (60) days as provided in the commitment.

During the sixty- (60-) day period, Glenn Eubanks, Vice-President and Manager of the Commercial Loan Department, and I met with the Plaintiffs and sent letters confirming our meetings with the Plaintiffs urging them to take certain steps to make the property ready for the closing of a permanent loan.

On June 24, 1975, I sent a letter to the Plaintiffs, a copy of which is attached hereto specifying what was needed to meet the requirements of the commitment of May 30, 1975. Of the ten (10) things specified in said letter, not one single item was supplied before July 31, 1975. There has never been a certification from the architect that the building has been completed in accordance with the plans and specifications. There has never been a certification from the contractor that the building has been completed in accordance with the plans and specifications. There has never been a letter from the mechanical contractor certifying that the equipment was installed according to the plans and specifications nor a letter indicating the type and capacity of the said unit. An as-built survey was finally secured, dated August 11, 1975. Said as-built survey shows the property to be short eight (8) parking spaces, therefore, not in conformity with the plans and specifications. An occupancy permit from the Codes Administration never was supplied by the Plaintiffs, but we did finally get one from the Codes Administration dated September 22, 1974. We have never been supplied with an insurance policy for fire and extended coverage as required. We have never received an attorney's opinion

or legal documents evidencing the applicant's capacity, legal authority, or good standing to execute the loan documents or audited financial statements. We have never received lien waivers from the general contractor and subcontractors. We have never received authorization for an attorney to make a preliminary title check at the Plaintiffs' expense. We never received a breakdown of costs to complete the remaining tenant finishings.

While the commitment itself was for an Eight Hundred Thousand and 00/100 ($800,000.00) Dollar permanent loan from First and Mid-South Mortgage Company if certain rental achievement clauses were met, we were informed that the Plaintiffs failed to meet those requirements, so the total amount to be funded in a permanent loan would have been Six Hundred Fifty-Six Thousand and 00/100 ($656,000.00) Dollars, but since the terms and conditions of the May 30, 1974, commitment were not met, no funds were provided.

Almost none of the provisions of our May 30, 1974, commitment were met. It is true there was a Deed of Trust which was a valid first lien on the property, but the Deed of Trust and Note which it secured were not in conformity with the terms specified in the loan so new legal papers would have had to been drawn and recorded. Because of this requirement, additional fees and expenses would have had to been paid by the Mortgagor or Plaintiffs. Most of the other provisions of the commitment were embodied in my letter of June 24th, except the loan documents certainly did not contain any provisions required by paragraph 9 of said commitment. Paragraph 11 of said commitment was not complied within that sixty (60) days in that notice to fund was not given.

Therefore, it is a fair summation to say that none of the terms and conditions in the May 30, 1974, commit-

ment of First and Mid-South Mortgage Company to the Plaintiffs were met by the Plaintiffs on or before July 31, 1975.

/s/ John A. Thweatt
John A. Thweatt

STATE OF TENNESSEE)

COUNTY OF DAVIDSON)

Personally appeared before me, Louise S. Clemons, a Notary Public in and for the State and County aforesaid, John A. Thweatt, who made oath that he had executed the foregoing Affidavit for the purposes therein contained and that said Affidavit is true of his own personal knowledge, except those things stated to be upon information and belief and those he verily believes to be true.

Witness my hand this 14 day of October, 1975, at Nashville, Tennessee.

/s/ Louise S. Clemons
(Seal) Notary Public

My Commission Expires: Feb. 4, 1979.

FIRST AND MID-SOUTH MORTGAGE COMPANY
Established 1935
P. O. Box 2568
Nashville, Tennessee
615/254-5401

June 24, 1975

Messrs. F. Murray Parker
and James K. Wall
c/o F. Murray Parker Builders, Inc.
Box 766
Brentwood, Tennessee 37027

Re: Brentwood Plaza Office Building

Gentlemen:

Per your letter of June 2, 1975, you served notice to First and Mid-South Mortgage Company that you wished to exercise your right under our commitment dated May 30, 1974. In order to determine if all the conditions of our commitment have been met, we are asking that the following information and items be provided First and Mid-South Mortgage Company no later than July 15, 1975.

(1) Certification from the architect that the building has been completed in accordance with the plans and specifications.

(2) Certification from the contractor that the building has been completed in accordance with the plans and specifications.

(3) A letter from the mechanical contractor certifying that the equipment was installed according to the plans and specifications and have the letter indicate the type and capacity of the units.

(4) As built survey which will also indicate the parking area and parking spaces.

(5) Occupancy permit from Codes Administration. A letter from the city showing that the subject is in compliance with zoning regulations.

(6) Fire and extended coverage insurance policies per Item 6 of our commitment.

(7) In accordance with paragraph 7 of our commitment, we require attorney's opinion and legal documents evidencing applicant's capacity, legal authority, good standing and the qualification of signers to execute the loan instruments. This is to include audited financial statements.

(8) Lien waivers from the general contractor and subcontractor.

(9) Written authorization for our attorney to make a preliminary title check at your expense.

(10) Breakdown of cost to complete remaining tenant finish.

Since the required rental achievement has not been attained, the loan will be closed in the amount of $656,000 at 10% interest for a term of 25 years. The prepayment option will be closed for 10 years, and beginning the 11th year, the prepayment penalty will be 5% reducing 1/2% per year for each additional year to a minimum of 1%. Other standard closing requirements will be included.

All other terms and conditions of our commitment must be complied with before closing.

Very truly yours,

/s/ John A. Thweatt
John A. Thweatt
Vice President

JAT:dm

(Title Omitted in Printing)

ORDER

(Filed October 14, 1975)

This cause having come on to be heard upon application of Plaintiffs for a temporary injunction enjoining Defendant, Third National Bank, from foreclosing that property known as Lots Nos. 8, 19 and 10 on the unrecorded Map of South Brentwood in Davidson County, Tennessee, pending further orders of this cou.t and a show cause order requiring Third National Bank to appear and show cause if any it has why said temporary injunction should not be granted.

From all of which it appears to the Court, based upon the pleadings, exhibits filed by Plaintiffs, and extensive argument of counsel, that Plaintiffs have sufficiently shown the existence of issues which should be determined upon a full hearing of this cause and that Plaintiffs would suffer irreparable harm if the foreclosure occurred prior to such full hearing.

It is accordingly ordered, adjudged and decreed that Defendant, Third National Bank, is temporarily enjoined from foreclosing the subject property pending the final hearing of this cause, upon Plaintiffs posting a bond in the amount of Five Thousand and No/100 ($5,000.00) Dollars and upon Plaintiffs paying the two months interest currently in arrears. It is further ordered, adjudged and decreed that Plaintiffs shall pay said interest monthly and the rentals obtained from the leases on said building shall be applied first to said interest. The interest payments shall be made direct to Third National Bank, on

or before the 5th day of each month, a default of which shall automatically dissolve this injunction

/s/ Ben H. Cantrell
Chancellor
Part One, Davidson Chancery

(Certificate of Service Omitted in Printing)

(Title Omitted in Printing)

SUPPLEMENTAL ANSWER OF THIRD NATIONAL BANK IN NASHVILLE

(Filed October 16, 1975)

The defendant, Third National Bank in Nashville, for its Supplemental Answer, adopts and incorporates by reference all matters contained in its original Answer and as a further defense states as follows:

THIRD DEFENSE

1. That this Court is without jurisdiction to issue a temporary injunction against Third National Bank in Nashville.

2. Further answering, this defendant prays to be dismissed with its reasonable costs in this cause including attorneys fees and expenses as provided in the note and deed of trust executed by the plaintiffs.

Farris, Evans & Warfield

By: /s/ Thos P. Kanaday, Jr.

By: /s/ Stephen W. Ramp

(Certificate of Service Omitted in Printing)

(Title Omitted in Printing)

MOTION OF THIRD NATIONAL BANK IN NASHVILLE

(Filed October 16, 1975)

Third National Bank moves as follows:

A. To dissolve the temporary injunction heretofore entered in this cause for want of jurisdiction;

B. To grant this defendant a new hearing on the issuance of a temporary injunction.

Farris, Evans & Warfield

By: /s/ Thos. P. Kanaday, Jr.

By: /s/ Stephen W. Ramp

(Certificate of Service Omitted in Printing)

(Title Omitted in Printing)

ANSWER OF FIRST AND MID-SOUTH MORTGAGE COMPANY

(Filed November 6, 1975)

For answer to the Complaint heretofore filed against the Defendant, First and Mid-South Mortgage Company, (hereinafter called "First and Mid-South"), the Defendant says:

1. The Complaint fails to state a claim against this Defendant upon which relief can be granted.

2. The Defendant has insufficient information or knowledge to admit or deny the allegations of Paragraph (1).

3. The Defendant has insufficient information or knowledge to admit or deny the allegations of Paragraph (2).

4. Defendant, First and Mid-South, denies the allegations of Paragraph (3). Defendant, First and Mid-South, alleges that the Plaintiffs made application to said Defendant on November 30, 1972, for a permanent commitment based on a loan of Seven Hundred Thousand and 00/100 ($700,000.00) Dollars for a twenty-seven- (27-) year term, the loan to become effective upon completion of the building in accordance with the plans and specifications. This financing was not secured: and finally Defendant, First and Mid-South, made a commitment to make a loan of Seven Hundred Thousand and 00/100 ($700,-000.00) Dollars at a rate of nine (9%) percent per annum for a term of twenty-five (25) years, by letter dated January 30, 1973. Defendant, First and Mid-South denies that it sought construction financing from the Third National Bank, denies that it gave the Third National Bank any assurance that it would be "taken out" at the completion of construction, and denies that any assurance was made which would provide security for the funds loaned by the Third National Bank.

5. Defendant, First and Mid-South, denies any agreement of January 10, 1973, of any sort involving Plaintiffs; but if such date is intended to be January 30, 1973, Defendant, First and Mid-South, admits it made a commitment dated January 30, 1973, which Plaintiffs accepted April 2, 1973, containing certain terms and conditions. Defendant, First and Mid-South, denies it made any assurance it would take the Third National Bank out at completion of construction. Defendant, First and Mid-South, only committed to do those things contained in said commitment

if all of the terms and conditions of said commitment were met.

6. Defendant, First and Mid-South, denies the allegations of Paragraph (5).

7. Defendant, First and Mid-South, denies the allegations of the first grammatical paragraph in Paragraph (6). Defendant, First and Mid-South, alleges that a representative of the Third National Bank suggested that it could be a preclosed loan and Defendant, First and Mid-South, had no objection; but Defendant, First and Mid-South, alleges that the Note and Deed of Trust executed by Plaintiffs were wholly and completely unsatisfactory for use in documenting the permanent loan in that said Note and Deed of Trust do not embody many of the terms and conditions of the permanent commitment as contained in the letter of January 30, 1973. Defendant, First and Mid-South, alleges that it would have been impossible for the construction loan as evidenced by the Note and Deed of Trust to be converted into a permanent loan and denies that the Third National Bank could simply sell or assign its loan documents to said Defendant, First and Mid-South. Defendant, First and Mid-South, alleges that it had no involvement in the securing of title insurance and that its attorney did not share in the preparation of said title insurance or the Note and Deed of Trust.

Defendant, First and Mid-South, agrees that it executed with the Third National Bank and the Plaintiffs, a Tri-Party Agreement to purchase said Note and Deed of Trust provided all of the terms and conditions of the commitment of January 30, 1973, were fulfilled. Defendant, First and Mid-South, admits that the Tri-Party Agreement contained a promise by the Plaintiffs that they would not accept a first mortgage loan upon the real

property from any other lender before the termination of the commitment by the permanent lender. Defendant, First and Mid-South, alleges that this Tri-Party Agreement only relates to the commitment of January 30, 1973, and that said commitment expired by its term on April 30, 1974. Defendant, First and Mid-South, alleges that at all times it gave its consent to the Plaintiffs obtaining any other first mortgage loan, both during the time the January 30, 1973, commitment was effective and thereafter, and further alleges that said Tri-Party Agreement only applies to the commitment of January 30, 1973, which had expired.

8. Defendant, First and Mid-South, denies that the commitment of January 30, 1973, was extended. Defendant, First and Mid-South, admits that it issued a new commitment on May 30, 1974. Defendant, First and Mid-South, alleges that no Tri-Party Agreement was executed with the Third National Bank based upon this commitment and further alleges that the previous commitment of January 30, 1973, had expired by its terms. The Defendant, First and Mid-South, alleges that the May 30, 1974, commitment reflected the marketing conditions at that time and called for an increased loan amount of Eight Hundred Thousand and 00/100 ($800,000.00) Dollars based on an increase in the rental achievement provisions. The commitment of May 30, 1974, expired July 31, 1975. Defendant, First and Mid-South, has insufficient information or knowledge to admit or deny the allegations concerning the payment of Forty Thousand and 00/100 ($40,000.00) Dollars for these commitments and extensions but admits that the Plaintiffs have paid to First and Mid-South a total of Nineteen Thousand and 00/100 ($19,000.00) Dollars for two (2) different commitments, the first of which the Plaintiffs let expire. Defendant, First and Mid-South, alleges that said fees for these commitments were sub-

stantially under the going market price for these commitments. Defendant, First and Mid-South, admits that it has not returned any of the Nineteen Thousand and 00/100 ($19,000.00) Dollars paid to it. Defendant, First and Mid-South, has received no interest on any funds.

9. Defendant, First and Mid-South, admits that the last commitment expired July 31, 1975. Defendant, First and Mid-South, admits that it was having difficulty obtaining another investor because of the deficiencies of construction and maintenance but alleges that it was prepared and ready, willing, and able to honor its own commitment. Defendant, First and Mid-South, denies that it was continuously bringing up new complaints and new requirements and denies that any of its suggestions were trite and of no consequence.

Defendant, First and Mid-South, denies that it made any totally new demands as a condition to honoring its commitment of May 30, 1974. Defendant alleges that for many weeks the Plaintiffs had been made aware that they were not in conformity with the plans and specifications previously supplied. One particularly substantial deficit was that there were eight (8) parking spaces less than were shown on the plan. Defendant, First and Mid-South, alleges that it was suggested that one way of solving the shortage in parking spaces, was to secure additional land to put required parking on but denies that any additional obligations were imposed upon the Plaintiffs. Defendant, First and Mid-South, denies that it required the Plaintiffs to obtain the lot adjacent to the existing building for additional parking spaces and denies that the Defendant required a survey showing the adjoining lot and additional parking spaces and alleges that the parking shortage could have been solved by the Plaintiffs in any way they so desired. The Defendants have insufficient information or

knowledge to admit or deny the allegations concerning the Plaintiffs proceeding to attempt to satisfy said requirements by pulling down trees on said lot and grading and filling said lot. Defendant, First and Mid-South, denies that the Plaintiffs were placed in an absolutely impossible position of obtaining a survey to show said adjacent lot as having no encumbrances or encroachments of liens since there was a building on said lot to be torn down and denies that this could be done only after the Plaintiffs exercised their option to purchase and denies that any proceeds from the funding of a permanent loan would have helped them financially to purchase said lot and denies that the Defendant was fully aware of the impossibility of this task.

Defendant, First and Mid-South, denies that the Plaintiffs were placed in an extremely frustrating position of attempting to meet new demands that were impossible to meet and denies they faced new ones every few days and alleges that no new demands were made at all, only the demand that the terms and conditions of the commitment be met. Defendant, First and Mid-South, denies that it was deliberately placing them in a position of making their performance impossible.

Defendant, First and Mid-South, denies that they made any new demands on the Plaintiffs at all, either before or after the request for funding in June of 1975.

10. Defendant, First and Mid-South, denies that it waived any requirements of the May 30, 1974, commitment, denies that said terms and conditions were substantially complied with on July 31, 1975, and denies that the building would have been fully completed but for new demands and hindrances.

11. Defendant, First and Mid-South, has insufficient knowledge or information to either admit or deny the allegations of Paragraph (10).

12. Defendant, First and Mid-South, has admitted that the Third National Bank has run an advertisement to foreclose said property on November 7, 1975, but as the entire record in this cause will show, has been enjoined from doing so.

13. Defendant, First and Mid-South, does not have sufficient information or knowledge to admit or deny the allegations concerning the Plaintiffs being in default on their loan to the Third and denies that Defendant, First and Mid-South, has made any loan to the Plaintiffs. Defendant, First and Mid-South, denies that it was to take out the Third by buying a Note and Deed of Trust executed by the Plaintiffs in May of 1973, and denies that it has wholly and totally failed to honor its commitment to the Third and denies that the Third National Bank has any remedy against the First and Mid-South under its contract and denies that it is simply seeking to foreclose the loan and wipe out any of Plaintiffs' equity. Defendant, First and Mid-South, would allege that said Defendant's obligations under the commitment of May 30, 1975, were totally conditioned upon the Plaintiffs meeting all of the terms and conditions of said commitment which the Plaintiffs have failed to do.

14. Defendant, First and Mid-South, denies that the Third National Bank has any remedy against the First and Mid-South, denies that the Third National Bank does not have a right to pursue a remedy against the Plaintiffs, denies that the Plaintiffs are caught between and at the mercy of the Defendants, and denies that the Plaintiffs were prohibited from seeking other financing under said Agreement.

15. Any allegations not herein specifically denied are hereby generally denied with the same force and effect as if they had been specifically denied.

16. Now having fully answered, Defendant, First and Mid-South, asks to be dismissed with its reasonable cost.

Schulman, McCarley, Hollins & Pride

By: /s/ Lewis D. Pride

Attorneys for Defendant, First and Mid-South Mortgage Company

P.O. Box 2707
Nashville, Tennessee 37219

(Certificate of Service Omitted in Printing)

(Title Omitted in Printing)

MEMORANDUM

(Filed December 9, 1975)

At a show cause hearing held to determine if the Bank should be enjoined from foreclosure of the property described in the complaint, the Court issued a temporary injunction stopping the sale. The Bank has filed a motion to dissolve the temporary injunction citing USCA §12-91. The parties have extensively briefed the question. Based upon the authorities cited in the briefs, it is the opinion of the Court that this Court lacks jurisdiction to issue the injunction.

Section 91 of 12 USCA reads as follows:

"Transfer by bank and other acts in contemplation of insolvency

All transfers of notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction, or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court." R.S. §5242.

In the case of *Pacific National Bank of Boston* v. *Mixter*, 124 U.S. 721 (1888), the Supreme Court of the United States said:

> "Although the provision(s) [of Section 91 were] evidently made to secure equality among the general creditors in the division of the proceeds of the property of an insolvent bank, its operation is by no means confined to cases of actual or contemplated insolvency. The remedy is taken away altogether and cannot be used under any circumstances.
>
> "It is further said that if the power of issuing attachments has been taken away from the state courts, so also is the power of issuing injunctions. That is true."

The rule announced in the *Mixter* case appears to have survived in an unbroken line of authority to the present time. There are only two exceptions which the Court finds in the briefs submitted by the parties. The first and most significant exception is found in the case of *Southern Alaska Canning Company* v. *Superior Court for King County, et al.*, 222 P. 203 (Wash., 1924). In that case the Bank was foreclosing a chattel mortgage and had issued notice of sale to the sheriff who took the mortgaged property into possession. The mortgagor instituted a proceeding in the Superior Court seeking to have the foreclosure transferred to that court alleging that it did not owe the Bank all of the sum set out in the notices but was entitled to a credit in a large sum. The Court issued a temporary injunction staying the action of the sheriff. This injunction was given without bond. It is true that the Court in that case used the following language:

> "That statute cannot have any weight here. Although the mortgagee was and is a national bank, it has undertaken in its foreclosure to take advantage of the statutes of this state, and it cannot take action under a part of that statute without being also bound by the other provisions of it."

However, the Court earlier in its opinion had confined its investigation to the question of whether or not the mortgagor must post bond in order to get the foreclosure removed to the Superior Court. The Court said:

> "The sole question before us is, where a mortgagor has instituted proceedings to transfer to the Superior Court a pending foreclosure by notice and sale given by the sheriff, of his chattel mortgage, must he give a bond before the Court will restrain the sheriff from further proceedings?"

So the injunction in that case was not to restrain the Bank from foreclosing but was to restrain the sheriff from proceeding after, under the laws of that state, an action had been instituted to transfer the foreclosure to the Superior Court. The action was not to stop the foreclosure but to transfer it to the court.

The only other exception discovered in the cases is where the property which is the subject of the injunction does not belong to the Bank.

Therefore, it seems to the Court to be clear that the statute above cited removes the jurisdiction of the Courts to grant temporary injunctions prohibiting the foreclosure of property in which the Bank has a security interest. Therefore, the injunction should be dissolved. Mr. Kanaday will prepare the decree.

/s/ Ben H. Cantrell
Chancellor

This December 9, 1975

xc: Ms. Gail Pigg
Mr. Thomas P. Kanaday
Mr. Stephen W. Ramp

(Title Omitted in Printing)

ORDER

(Filed January 8, 1976)

This cause came on to be heard upon motion of Defendant, Third National Bank, to dissolve a temporary injunction against foreclosure of the property described in the complaint, said motion to dissolve being based upon the fact that the court did not have jurisdiction to grant

a temporary injunction against a national bank pursuant to USCA §12-91.

It is the opinion of the court, after reading the statute and the cases cited by counsel, that the statute so cited does remove the jurisdiction of the court to grant temporary injunctions prohibiting the foreclosure of property in which the bank has a security interest.

It is accordingly ordered, adjudged and decreed that the injunction heretofore granted should be dissolved.

However, pursuant to motion of Plaintiff for a discretionary appeal from said order, and said order dissolving an injunction heretofore granted, and it further appearing that the order involves a question of law as to which there is substantial ground for difference of opinion, that question being whether a state court is prohibited by USCA §12-91 from granting a temporary injunction against a national bank when that bank has a security interest in the subject property;

It is accordingly ordered, adjudged and decreed that the Plaintiff is granted an appeal from the above order, to the Supreme Court, upon perfecting said appeal within thirty (30) days from the date of entry of the order.

It is further Ordered, Adjudged and Decreed that the defendant bank is stayed from foreclosure of the subject property until plaintiff is able to perfect the appeal and remove the record to the Supreme Court.

This 8th day of January, 1976.

/s/ Ben H. Cantrell
Chancellor

(Certificate of Service Omitted in Printing)

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE
For Publication
Davidson Equity
Honorable Ben H. Cantrell
Chancellor

IMPAC LIMITED, INC.,
F. MURRAY PARKER and
JAMES K. WALL,
Appellants,

vs.

THIRD NATIONAL BANK and
FIRST AND MID-SOUTH
MORTGAGE COMPANY,
Appellees.

For Appellants:
Gail P. Pigg
Nashville, Tennessee

For Appellees:
Thomas P. Kanaday, Jr.
Nashville, Tennessee
Stephen W. Ramp
Nashville, Tennessee

OPINION

(Filed August 16, 1976)

Reversed and Remanded — Wm. H. D. Fones, J.

OPINION

The question presented by this interlocutory appeal is whether a section of the National Bank Act prohibits a state court from issuing an injunction against a national bank, as mortgagee, temporarily restraining it from foreclosing upon appellant's property.

Appellant brought this action against appellee in the Chancery Court of Davidson County when appellee declared appellant in default on a note secured by a deed of trust on real property and advertised the property for sale, pursuant to terms contained in the deed of trust. Appellant sought to enjoin appellee from proceeding with the foreclosure sale and set forth the grounds upon which it sought the injunction. The Chancellor found, upon the pleadings, exhibits, and arguments of counsel at the show cause hearing, that there existed issues which should be determined upon a full hearing; and that appellants would suffer irreparable harm if the foreclosure sale occurred prior to the hearing. Upon these findings, the Chancellor issued a temporary injunction prohibiting appellee from foreclosing on appellant's property prior to a full hearing on the merits of the cause.

Appellee then moved the Trial Court to dissolve the temporary injunction on the basis that 12 U.S.C.A. §91, denied the Court jurisdiction to issue the injunction. The motion was granted, and the Chancellor allowed appellant a discretionary appeal to this Court.

The statute upon which appellee relies, reads as follows:

> §91. *Transfers by bank and other acts in contemplation of insolvency*
>
> All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation

> thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction, or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court.

Appellee maintains that this statute, and the case law construing it, prohibits the courts of this State from issuing an interlocutory injunction against a national bank under any circumstances. This view necessarily encompasses the position that regardless of the degree of wrongdoing on the part of a national bank against one of its debtors, resulting in irreparable damage, our courts, both state and federal, are prohibited from exercising jurisdiction and allowing an equitable remedy until a full trial on the merits of the cause has been completed. We cannot accept appellee's position as a correct exposition of the law.

The leading case construing the statute is *Pacific National Bank of Boston* v. *Mixter*, 124 U.S. 721, 8 S.Ct. 718, 31 L.Ed. 567 (1888). There plaintiffs began a suit against the bank in the United States Circuit Court (now District Court) of Massachusetts by writ of attachment for the amounts owed them. At the time the lawsuit was instituted, the bank was solvent; but it later closed, and a receiver was appointed to wind up its affairs. The question before the Court was whether an attachment could issue against a solvent national bank before final judgment in a suit begun in federal court.

The Court noted that although the prohibition against interlocutory injunctions did not expressly apply to federal

courts, those courts were only authorized to issue attachments in common law causes as provided by the applicable state law. The Court held that the power of state courts to issue attachment (and injunctions) prior to final judgment had been eliminated by the federal statute and that the statute was not limited to protecting insolvent banks:

> Although the provision was evidently made to secure equality among the general creditors in the division of the proceeds of the property of an insolvent bank, its operation is by no means confined to cases of actual or contemplated insolvency. The remedy is taken away altogether and cannot be used under any circumstances.
>
> 124 U.S. at 727.

We are of the opinion that the precedential value of the broad language of the last quoted sentence is limited to the facts of the case in which it was spoken, and that the *ratio decidendi* of *Mixter* does not extend to the facts of the case at bar. We reach this conclusion only after a careful search for subsequent decisions of the United States Supreme Court interpreting 12 U.S.C.A. §91. We are unable to find that the *Mixter* rationale has been applied to the converse situation; that is, a situation in which a debtor of a national bank is seeking, by interlocutory injunction, to protect *his* property from wrongful seizure and foreclosure sale by the bank. *See, Van Reed* v. *People's National Bank of Lebanon*, 198 U.S. 554, 25 S.Ct. 775, 49 L.Ed. 1161 (1905); *Mechanics Universal Joint Company* v. *Culhane*, 299 U.S. 51, 57 S.Ct. 81, 81 L.Ed. 33 (1936). Nor have we found any federal court of appeals or district court decisions which make the *Mixter* decision so applicable.

Although we have read with interest the opinions in other states which hold contra to our decision today, *Free-*

man Mfg. Co. v. *National Bank of Boston*, 160 Mass. 398, 35 N.E. 865 (1894); *Metropolitan Lumber Co.* v. *Fordham Nat. Bank*, 102 N.J.Eq. 514, 141 A. 742 (1928); *First National Bank of Oakland* v. *Superior Court*, 240 Cal.App.2d 109, 49 Cal.Rptr. 358, *cert. denied* 385 U.S. 829 (1966), we are not persuaded by what appears to be blind reliance on *dicta* in the federal cases. Rather, we look to the purpose of the statute which was to secure the assets of a bank, whether solvent or insolvent, for ratable distribution among its general creditors and to protect national banks in general. *See, e.g., First National Bank* v. *Colby*, 21 Wall 609, 22 L.Ed. 687 (1874); *Loew's Inc.* v. *Superior Court*, 301 P.2d 64 (Cal.App. 1956).

In our opinion, the decision in *Earle* v. *Penn, et al.*, 178 U.S. 449, 44 L.Ed. 1146, 20 S.Ct. 915 (1900), undermines the literalism accorded by courts of our sister states to the *Mixter* Court's statement that the remedies of attachment, injunction and execution are taken away altogether and cannot be used under any circumstances. A writ of attachment by garnishment was issued and served upon the Chestnut Street National Bank, as garnishee, to reach the assets of one James Long; and upon the answer and interrogatories filed by the bank, judgment was entered against the bank. Shortly thereafter the bank closed, and Earle was appointed receiver. He intervened and moved to vacate the judgment and dismiss the attachment upon the authority of the statute under consideration here. In reviewing the decision of the Supreme Court of Pennsylvania sustaining the attachment and judgment against the bank or garnishee, Mr. Justice Harlan, writing for the court said:

> "Sections 5234, 5235, and 5236, above quoted, have reference to the affairs and property of national banks in the hands of receivers, and the administration of its assets by the Comptroller; and the words in § 5242,

> 'no attachment, injunction, or execution shall be issued against such association or its property before final judgment in any suit, action, or proceeding in any state, county, or municipal court,' are to be construed in connection with the previous parts of the same section declaring null and void certain transfers, assignments, deposits, and payments made after the commission by the bank 'of an act of insolvency, or in contemplation thereof.' with the intent to prevent the application of the bank's assets in the manner prescribed by Congress, or with a view of the preference by the bank of one creditor to another. Whatever may be the scope of § 5242, an attachment sued out against the bank *as garnishee* is not an attachment against the bank or its property, nor a suit against it, within the meaning of that section. It is an attachment to reach the property or interests held by the bank for others."
>
> 178 U.S. at 453, 454.

In the instant case, appellee is not using the statute as a shield to protect its assets, but is using it to preclude appellant from protecting its own property. True, appellee has a security interest of $700,000 in the property. However, the property is in the form of an office building allegedly worth in excess of $1,000,000 which cannot be sold, or assigned, or spirited away in the dark of the night so as to defeat appellee's security interest. The Chancellor predicated the temporary injunction (before it was dissolved) upon the condition that appellant continue to pay interest on the $700,000 at the contract rate until a final determination on the merits could be made. In short, appellee's security interest in appellant's property was completely protected.

Without the issuance of the temporary injunction, however, appellant's property would have been sold without equity of redemption; and its only remedy would be to bring an action against the bank for damages. This type of inadequate and incomplete relief at law prompted the fashioning of equitable relief, which appellee says is not available in this situation.

Appellee seeks to rely on the procedure of public foreclosure sale sanctioned by the laws of this State, but maintains that appellant is unable to avail itself of the statutory protection of T.C.A. §§23-2401 *et seq.* We cannot allow appellee to avail itself of the law favorable to it and not be bound by that part which accords relief to appellant, *State* v. *Superior Court*, 128 Wash. 100, 222 P. 203 (1924).

We have determined that the United States District Courts in this State would have no jurisdiction to entertain this action, *Bachman* v. *First Mechanics Nat. Bank of Trenton*, 69 F.Supp. 739 (D.C. N.J. 1947); *Rooney* v. *First Wisconsin National Bank*, 332 F.Supp. 108 (1971), and that our State courts provide the only forum in which appellant may obtain relief.

Reversed and remanded to the Chancery Court of Davidson County for proceedings consistent with this opinion. Costs of this appeal are adjudged against appellee.

/s/ Wm. H. D. Fones
Justice

Concur:

Cooper, C.J.

Harbison, J.

Henry, J., not participating

Brock, J., dissents—see separate opinion

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE
For Publication
Davidson Equity
Hon. Ben H. Cantrell,
Chancellor

IMPAC LIMITED, INC., F. MURRAY PARKER and JAMES K. WALL,
Appellants,

vs.

THIRD NATIONAL BANK and FIRST AND MID-SOUTH MORTGAGE COMPANY,
Appellees.

DISSENTING OPINION

(Filed August 16, 1976)

I respectfully dissent. I do so most reluctantly because the majority opinion has reached a just result. It is my view, however, that the last clause of 12 U.S.C.A., § 91, absolutely forbids the issuance by a state court of a temporary injunction or any similar process against a national bank prior to entry of a final judgment or decree. That clause provides:

> ". . .; and no attachment, injunction, or execution, shall be issued against such (national banking) association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court."

As acknowledged in the majority opinion, the Supreme Court of the United States has construed this provision to apply not only to insolvent national banks but to sol-

vent ones as well. That Court has said that "The remedy is taken away altogether and cannot be used under any circumstances." *Pacific National Bank of Boston* v. *Mixter*, 124 U.S. 721, 8 S. Ct. 718 (1888). The opinion in the *Mixter* case traces the legislative history of § 91 and makes clear that the intent of Congress was to protect all national banks from all pre-judgment injunctions, attachments, etc., issuing from state courts. The distinction made in the majority opinion between state court actions brought by *debtors* of a national bank and those brought by *creditors* of a national bank is, in my opinion, not a valid one because the harm to the national bank defendant is the same whether the injunction is sought by a debtor or by a creditor. See *First National Bank of Oakland* v. *Superior Court*, 240 Cal. App. 2d 109, 49 Cal. Rptr. 358 (1966), cert. den. 87 S. Ct. 65 (1966); *Miller* v. *Mercantile National Bank of Hammond*, 234 Ind. 202, 125 N.E.2d 720 (1955); *Kemple* v. *Security First National Bank of Los Angeles*, 249 C.A. 719, 57 Cal. Rptr. 838 (1967); *Freeman Mfg. Co.* v. *National Bank of Republic*, 160 Mass. 398, 35 N.E. 865 (1894). A temporary injunction by a debtor restraining foreclosure of a deed of trust belonging to the bank constitutes interference with the assets of the bank in the same way as does an attachment by a creditor of the same deed of trust. Accordingly, I would hold that the Chancellor was correct.

/s/ Ray L. Brock
Brock, J.

SUPREME COURT, NASHVILLE

Davidson Equity

Reversed and Remanded.

IMPAC LIMITED, INC., F. MURRAY PARKER and JAMES K. WALL,

Appellants

vs.

THIRD NATIONAL BANK and FIRST AND MID-SOUTH MORTGAGE COMPANY,

Appellees

ORDER

(Filed August 16, 1976)

This cause coming on to be heard upon a transcript of the record from the Chancery Court of Davidson County, assignments of error, reply brief and argument of counsel, upon consideration whereof the Court is of opinion that in the decree of the Chancellor there is reversible error.

In accordance with the opinion of the Court filed herein, it is, therefore, ordered and decreed by this Court that the decree of the Chancellor be reversed and that the cause be remanded to the Chancery Court of Davidson County for proceedings consistent with the Court's opinion, a certified copy of which will accompany the procedendo on the remand, and for the collection of the costs of the cause below; for all of which, let procedendo issue.

The costs of the appeal will be paid by Third National Bank in Nashville, for which execution may issue if necessary. 8/16/76.

(Brock, J., Dissenting)

Supreme Court, U. S.
FILED
DEC 10 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-674

THIRD NATIONAL BANK IN NASHVILLE, *Petitioner,*

vs.

IMPAC LIMITED, INC., F. MURRAY PARKER and JAMES K. WALL, *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

BRIEF FOR RESPONDENTS IN OPPOSITION

GAIL P. PIGG
8th Floor
Home Federal Tower
230 Fourth Avenue, North
Nashville, Tennessee 37219
Counsel for Respondents

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

INDEX

Question Presented 1
Statutes Involved 1
Statement 3
Argument 5
Conclusion 10

Authorities Cited

Statutes

Tennessee Code Annotated 23-2401—23-2404 ..... 2, 9
12 U.S.C. §91 (1970) 1, 2, 5, 6, 7, 9, 10

Table of Cases

Bachman v. *First Mechanics National Bank of Trenton*, 69 F. Supp. 739 (D.C. N.J., 1947) 5
Drewes and Co. v. *Ham and Seymour*, 103 So. 241 (La., 1925) 8, 9
Earle v. *Pennsylvania, et al.*, 178 U.S. 449, 44 L.Ed. 1146, 20 S.Ct. 915 (1900) 8
First National Bank v. *Colby*, 21 Wall. 609, 22 L.Ed. 687 (1874) 6
Loew's Inc. v. *Superior Court*, 301 P. 2d 64 (Cal. App., 1956) 6
Pacific National Bank of Boston v. *Mixter*, 124 U.S. 721, 8 S.Ct. 718, 31 L.Ed. 567 (1888) 6, 7, 8
Prentiss v. *Chandler*, 85 F. 2d 733 (Cal., 1936) 6
Rooney v. *First Wisconsin National Bank*, 332 F. Supp. 108 (1971) 5
State ex rel. Southern Alaska Canning Co. v. *Superior Court for King County et al.*, 128 Wash. 100, 222 P. 203 (1924) 9
Uhl v. *First National Bank and Trust Co. of Kalamazoo*, 24 F. Supp. 275 (Mich., 1935) 6

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-674

THIRD NATIONAL BANK IN NASHVILLE, *Petitioner*,

vs.

IMPAC LIMITED, INC., F. MURRAY PARKER
and JAMES K. WALL, *Respondents*.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF TENNESSEE

BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

Whether a section of the National Bank Act, 12 U.S.C. §91 (1970) prohibits a state court from issuing an injunction against a national bank prior to a final judgment, temporarily restraining it from foreclosing upon collateral?

STATUTES INVOLVED

Petitioner cites 12 U.S.C. §91 (1970) as the statute involved, being that statute headed "Transfers by bank and other acts in contemplation of insolvency."

In addition to Section 91 of the National Banking Act, this case involves the Tennessee statute, "Sale Under Trust Deeds and Mortgages." *Tennessee Code Annotated* 23-2401—23-2404, which provides in pertinent part:

> T.C.A. 23-2401 (1873, mod. 1950). Notice of Application to enjoin sale.
>
> No judge or chancellor shall grant an injunction to stay the sale of real estate conveyed by deed of trust or mortgage, with a power of sale, executed to secure the payment of a loan of money, unless complainant gives five (5) days' notice to the trustee or mortgagee of the time when, place where, and of the judge or chancellor before whom said application for injunction is to be made. . ."
>
> T.C.A. 23-2403 (1873, mod. 1932) . . . After the reading of the bill in the hearing of the trustee or mortgagee, if he chooses to appear before the judge or chancellor, the said trustee or mortgagee may have the right to a delay of proceedings not more than ten (10) days, during which time he may file his answer before the same judge or chancellor.
>
> T.C.A. 23-2404 (1873, mod. 1932) Decree—The judge or chancellor may then, upon such bill and answer, hear said cause, at chambers, as upon motion to dissolve the injunction, his decision to be in a written decree, which decree, together with the bill, answer and exhibits, shall be enclosed in a sealed envelope, to the clerk of the court in which the bill is filed, said decree to constitute a part of the record in the cause, in conformity, to the terms of which, said clerk may take bonds from either party, or execute any other order as adjudged in said decree.

STATEMENT

Respondents disagree with certain portions of Petitioner's statement of the case, and further state that, as the question before this Honorable Court involves an interlocutory appeal only, rather than an appeal from a full hearing on the merits, the facts going to the merits are, for the most part, irrelevant. Nevertheless, respondents state the case as follows:

1. Petitioner is a national banking association with its principal place of business, along with numerous branches, located in Nashville, Davidson County, Tennessee.
2. In May, 1973, Petitioner made a "permanent-construction" loan (a construction loan, which at time of completion, would simply be converted into a permanent loan) to Respondents evidenced by a $700,000.00 note which is secured by a deed of trust encumbering the property, an office building.
3. On or about the same date, Petitioner, the Respondents and First and Mid-South Mortgage Company entered into a tri-party agreement whereby First and Mid-South agreed to purchase the note and security instrument from Petitioner at completion of the construction.
4. At the time scheduled for closing in the summer of 1975, First and Mid-South refused to purchase the note from Petitioner as it had agreed, and, as its excuse, stated that certain conditions had not been met.
5. Petitioner did not pursue its remedy against First and Mid-South for breach of the tri-party agree-

ment, but declared the note in default and proceeded to foreclose the property under its deed of trust. The principal balance due was $700,000.00, and the property was NOW valued in excess of $1,000,000.00.

6. On September 26, 1975, Respondents filed a complaint in the Chancery Court of Davidson County, Tennessee, seeking to temporarily restrain Petitioner from foreclosure pending a full hearing on the merits, and in that complaint, set forth the grounds upon which the injunction was sought. A restraining order was not issued *ex parte* as stated in Petitioner's brief, but Petitioner was required to appear and show cause why a temporary injunction should not issue.

7. At the show cause hearing October 8, 1975, the chancellor found, upon the pleading, exhibits filed by Respondents, and extensive argument of counsel, that Respondents had shown the existence of issues which should be determined upon a full hearing on the merits, and that Respondents would suffer irreparable harm if the foreclosure occurred prior to such full hearing. (See Appendix B of Petition for Certiorari at pages A10-A11)

8. A few days thereafter, Petitioner moved the Court to dissolve the injunction charging that under 12 U.S.C. §91, the court did not have jurisdiction to grant a temporary injunction prohibiting the foreclosure of property in which the bank has a security interest. The Chancellor found in favor of the Petitioner's position and entered an order on January 8, 1976, dissolving the injunction, but granting Respondents leave to perfect an interlocutory appeal to the Supreme Court of Tennessee.

(See Petition for Certiorari, Appendix C, at pages A15-A16)

9. The Supreme Court of Tennessee held that Section 91 of the National Banking Act does not bar a state court from issuing a temporary injunction restraining a national bank from foreclosing collateral and reversed the Chancellor's order. One of the justices did not participate in the majority opinion and one dissented. The Supreme Court of Tennessee, in its opinion, also found that "the United States District Courts in this State would have no jurisdiction to entertain this action . . . and that our State courts provide the only forum in which appellant may obtain relief." (See Petition for Certiorari, Appendix A, page A7)

ARGUMENT

Petitioner, in its Writ of Certiorari, maintains that a state court is prohibited by 12 U.S.C.A. §91 from issuing an interlocutory injunction against a national bank under any circumstances. Petitioner, in effect, argues that whatever wrongdoing a bank may commit, and whatever degree of culpability is involved in foreclosing property in which it has a security interest, and whatever irreparable damage is caused that bank's customer by that foreclosure, the state courts are powerless and cannot act.

It should be stated here that the United States District Courts in Tennessee do not have jurisdiction to entertain the action involved in this cause (*Bachman* v. *First Mechanics National Bank of Trenton*, 69 F. Supp. 739 (D.C. N.J., 1947); *Rooney* v. *First Wisconsin National Bank*, 332 F. Supp. 108 (1971)). Thereby, under Petitioner's interpretation of 12 U.S.C.A. §91, those customers who are

irreparably injured by wrongful foreclosure are literally without remedy.

12 U.S.C.A. §91 is clearly, by its own terms, a statute providing regulations in regard to transfers by banks and other acts *in contemplation of insolvency.* That is the *plain meaning* of the statute. Its purpose is to guard against wrongful or preferential disposition of assets of banks known to be or about to become insolvent, and to secure equality of distribution of the assets of an insolvent bank among its creditors. *Prentiss* v. *Chandler,* 85 F. 2d 733 (Cal., 1936); *Uhl* v. *First National Bank and Trust Co. of Kalamazoo,* 24 F. Supp. 275 (Mich., 1935); *First National Bank* v. *Colby,* 21 Wall. 609, 22 L.Ed. 687 (1874); *Loew's Inc.* v. *Superior Court,* 301 P. 2d 64 (Cal. App., 1956).

It is an uncontroverted fact that Petitioner is neither insolvent nor contemplating insolvency. Nevertheless, Petitioner argues that the case of *Pacific National Bank of Boston* v. *Mixter,* 124 U.S. 721, 8 S.Ct. 718, 31 L.Ed. 567 (1888) removes altogether the remedy of injunction against a national bank under any circumstances, without regard to insolvency or contemplation of insolvency.

The issue, then, narrows itself to whether the *Mixter* case extended the plain language of 12 U.S.C.A. §91 to bar temporary injunctions by state courts, pending a final hearing, against a national bank in literally *any* case. It then becomes necessary to examine the facts of the *Mixter* case.

The bank owed Mixter Fifteen Thousand Dollars. Mixter began a suit by attachment to try to recover the monies due him. There were, at the same time, other creditors of the bank who were attempting to attach. While the bank was not *insolvent,* it was having difficulties with

creditors, and the bank would clearly be injured if an attachment issued prior to final judgment. Thus, we are brought to the finding of the court that the bank did not have to be actually insolvent or contemplating insolvency for Section 91 to apply, and the language that "The remedy is taken away altogether and cannot be used under any circumstances." *Mixter, supra,* p. 727. This case, however, dealt with the bank's *creditors,* and not its *debtors,* as is true in the case at hand.

While the *Mixter* case did interpret the statute to apply to dealings with creditors in cases where the banks are not yet insolvent or contemplating insolvency, it *did not* extend the case beyond its intent—to guard against preferential or wrongful disposition of banks by its *creditors.* Petitioner has a mortgage division, dealing in literally millions of dollars worth of home loans annually, those loans secured by the borrower's homeplace. In addition, of course, it makes loans for construction of commercial buildings, whereby after the borrower has constructed the building, its value far exceeds the amount owing on the construction loan, as is true in the case at hand. To extend Section 91 to disallow state courts to grant injunctions against banks in controversies which arise out of their everyday dealings with their debtors is to stretch the meaning of the statute beyond all bounds of reason and give to the banks a power over their adversaries as yet unheard of in our courts.

The Tennessee Supreme Court was of the opinion that the broad language of the court in the *Mixter* case is limited to the facts of the case in which it was spoken, and in its opinion, looked to the purpose of the statute itself.

Petitioner's theory as set forth in the Writ of Certiorari literally *adds to* the statute in question and ex-

tends it far beyond the scope of its plain meaning—to guard against wrongful or preferential disposition of the bank's assets. Petitioner holds forth that the *Mixter* case establishes that the remedies of attachment, injunction and execution are taken away from the state courts altogether, and under any circumstances. Yet, the remedy of attachment by garnishment was upheld by the United States Supreme Court in *Earle* v. *Pennsylvania, et al.*, 178 U.S. 449, 44 L.Ed. 1146, 20 S.Ct. 915 (1900), in which Justice Harlan, writing for the court, said:

> "Sections 5234, 5235, and 5236, above quoted, have reference to the affairs and property of national banks in the hands of receivers, and the administration of its assets by the Comptroller; and the words in §5242, 'no attachment, injunction, or execution shall be issued against such association or its property before final judgment in any suit, action, or proceeding in any state, county, or municipal court,' are to be construed in connection with the previous parts of the same section declaring null and void certain transfers, assignments, deposits, and payments made after the commission by the bank 'of an act of insolvency, or in contemplation thereof,' with the intent to prevent the application of the bank's assets in the manner prescribed by Congress, or with a view of the preference by the bank of one creditor to another. Whatever may be the scope of §5242, an attachment sued out against the bank *as garnishee* is not an attachment against the bank or its property, nor a suit against it, within the meaning of that section. It is an attachment to reach the property or interests held by the bank for others." 178 U.S. at 453, 454.

In the case of *Drewes and Co.* v. *Ham and Seymour*, 103 So. 241 (La., 1925), the court dealt extensively with

the question as to whether, in light of 12 U.S.C.A. §91, a state court could issue a preliminary and ancillary injunction to restrain a national bank from paying a draft. In an indepth study of Section 91 and in looking at numerous cases applying thereto, as recited in the court's opinion, the court found those cases applying Section 91 to be cases in which the suit and main demand was against the bank as the debtor or obligee (*Drewes*, p. 244). The court found that the injunction in that case was proper.

Again, the obvious intent of Section 91 is to preserve and safeguard assets of the bank against wrongful disposition, pending a final hearing—it was not intended to give the national banks a license to themselves wrongfully dispose of assets of their debtors pending a final hearing.

Petitioner has chosen to engage on a large scale basis in mortgage financing of homes and other improvements, thereby bringing into play Tennessee law relating to deeds of trust. Guidelines for public foreclosure sales under trust deeds and the injunctions of such sales are established under *Tennessee Code Annotated* 23-2401—23-2404, "Sale Under Trust Deeds and Mortgages." Petitioner seeks to rely on Tennessee law on the one hand, but on the other, asserts that appellant cannot invoke the protection against unlawful foreclosures provided a mortgagee by the above statutes. Petitioner should not be permitted to use to its advantage the portion of law favorable to it, but assert that it is outside the court's reach as to that portion not favorable to it. The Tennessee Supreme Court recognized the dangers inherent by a mortgage banker being placed in such a position, as did the court in *State ex rel. Southern Alaska Canning Co.* v. *Superior Court for King County et al.*, 128 Wash. 100, 222 P. 203 (1924), wherein the bank sought to foreclose a chattel mortgage and was proceeding with foreclosure when the

mortgagor sought a temporary injunction, alleging a credit due him against the note securing the chattel mortgage. The bank asserted 12 U.S.C.A. §91 as a defense. The court stated in response:

> "That statute cannot have any weight here. Although the mortgagee was and is a national bank, it has undertaken in its foreclosure to take advantage of the statutes of this state, and it cannot take action under a part of that statute without being also bound by the other provisions of it." p. 205.

CONCLUSION

For the reasons stated above, Respondents say that a Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

GAIL P. PIGG
8th Floor
Home Federal Tower
230 Fourth Avenue, North
Nashville, Tennessee 37219
Counsel for Respondents

Supreme Court, U. S.
FILED
FEB 23 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-674

THIRD NATIONAL BANK IN NASHVILLE,
Petitioner,

vs.

IMPAC LIMITED, INC., et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

BRIEF FOR PETITIONER

THOMAS P. KANADAY, JR.
FARRIS, EVANS & WARFIELD
18th Floor, Third National Bank Building
Nashville, Tennessee 37219
Counsel for Petitioner

Of Counsel:
STEPHEN W. RAMP
FARRIS, EVANS & WARFIELD

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

INDEX

Opinions Below 1

Jurisdiction 2

Question Presented 2

Statute Involved 2

Summary of the Case 3

The Legislative History of Section 91 of the National Bank Act 6

Argument 12

I. The Decision Of The Tennessee Supreme Court Overrules Holdings Of The United States Supreme Court 12

A. The Mixter Decision 12

B. The Earle Decision 15

C. The Van Reed Decision 16

D. Lower Court Decisions 18

E. The Decision Below 23

II. The Decision Of The Tennessee Supreme Court Constitutes An Impermissible Infringement Upon The Authority And Prerogative Of Congress To Regulate National Banks 27

A. Congress, Not The States, Is Empowered To Regulate National Banks 27

B. The Power To Regulate National Banks Entails The Power To Create Special Privileges And Immunities For National Banks 27

C. The Tennessee Supreme Court's Construction Of Section 91 Deprives National Banks In Tennessee Of Powers And Privileges Possessed By National Banks In Other States 29

III. The Court Should Abide By The Established Meaning Of The Anti-Injunction Proviso And Reverse The Court Below 30

Conclusion 32

TABLE OF CASES

Agricultural National Bank v. *Tax Commissioner*, 392 U.S. 339 (1968) 31

American National Bank of Macon v. *Dure*, 148 Ga. 498, 97 S.E. 70 (1918) 22

Chesapeake Bank v. *The First National Bank of Baltimore*, 40 Md. 269, 17 Am. Rep. 601 (1874) 22, 23

Dennis v. *First National Bank of Seattle*, 127 Cal. 453, 59 P. 777 (1899) 22

Drewes & Co. v. *Ham & Seymour*, 103 So. 241 (La. 1925) 25

Earle v. *Pennsylvania*, 178 U.S. 449 (1900) 15, 16, 18, 23, 24, 25

First National Bank v. *La Due*, 39 Minn. 415, 40 N.W. 367 (1888) 23

First National Bank of Charlotte v. *Morgan*, 132 U.S. 141 (1889) 28

First National Bank of Oakland v. *Superior Court of California*, 240 Cal. App.2d 109, 49 Cal. Rptr. 358, *cert. denied*, 385 U.S. 829 (1966) 20

Flood v. *Kuhn*, 407 U.S. 258 (1972) 31

Freeman Mfg. Co. v. *National Bank of the Republic of Boston*, 160 Mass. 398, 35 N.E. 865 (1894) 11, 16, 18, 22, 26

Garner v. *Second National Bank of Providence*, 66 F. 369 (C.C.S.D. N.Y. 1895) 22

Hill v. *First National Bank*, 163 Ga. 458, 136 S.E. 437 (1927) 22, 29

Kemple v. *Security First National Bank of Los Angeles*, 57 Cal. Rptr. 838 (1967) 20, 21

McClain v. *Commissioner*, 311 U.S. 527 (1941) 31

McCulloch v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819) 27

Mercantile National Bank v. *Langdeau*, 371 U.S. 555 (1963) 28, 29

Metropolitan Lumber Co. v. *Fordham National Bank in New York*, 102 N.J.Eq. 514, 141 A. 742 (1928) 21

Meyer v. *First National Bank of Coeur d'Alene*, 10 Idaho 175, 77 P. 334 (1904) 22

Miller v. *Mercantile National Bank of Hammond*, 234 Ind. 202, 125 N.E.2d 720 (1955) 22

National Bank of North America v. *Associates of Obstetrics & Female Surgery*, 96 S.Ct. 1632 (1976) 28

National Bank of Savannah v. *Craven*, 147 Ga. 753, 95 S.E. 246 (1918) 20, 21

Pacific National Bank of Boston v. *Mixter*, 124 U.S. 721 (1888) 2, 12, 16, 18, 21, 23, 24, 25, 32

Planters' Loan & Savings Bank v. *Berry*, 91 Ga. 264, 18 S.E. 137 (1893) 22

Prentiss v. *Chandler*, 85 F.2d 733 (9th Cir. 1936) 25

Robinson v. *First National Bank of Plainview*, 45 F.2d 613 (N.D. Tex. 1930), *aff'd on other grounds*, 55 F.2d 209 (5th Cir. 1932) 22

Radzanower v. *Touche, Ross & Co.*, 96 S.Ct. 1989 (1976) 29

Rosenheim Real-Estate Co. v. *Southern National Bank*, 46 S.W. 1026 (Tenn.Ch.App. 1897) 23, 32

Safford v. *First National Bank*, 61 Vt. 373, 17 A. 748 (1889) 23

State ex rel. Southern Alaska Canning Co. v. *Superior Court for King County*, 222 P. 203 (Wash. 1924) 25, 26

Third National Bank in Nashville v. *Impac Ltd., Inc.*, 541 S.W.2d 139 (Tenn. 1976), *cert. granted*, 97 S.Ct. 731 (1977) 1, 2
Toolson v. *New York Yankees*, 346 U.S. 356 (1953) 31
Uhl v. *First National Bank & Trust Co. of Kalamazoo*, 24 F.Supp. 275 (W.D. Mich. 1935) 25
Van Reed v. *People's National Bank*, 198 U.S. 554 (1905) 16, 18, 21, 24, 25, 28

STATUTES CITED

Act of June 3, 1864, ch. 106, § 52, 13 Stat. 115 ..... 10, 28
Act of June 3, 1864, ch. 106, § 57, 13 Stat. 116 ..... 6, 7, 9, 10, 11, 12, 23, 28
Act of March 3, 1873, ch. 269, § 2, 17 Stat. 603 ..... 7, 8, 9
Act of February 18, 1875, ch. 80, 18 Stat. 320 ..... 10, 11
13 REVISED STATUTES, ch. III, § 34(15) (1873) 9
13 REVISED STATUTES, ch. VII, § 100(9) & (10) (1873) 9
13 REVISED STATUTES, ch. XXI (1873) 9
65 REVISED STATUTES, ch. IV at 52 (1873) 9
62 REVISED STATUTES § 5242 (1875) 10
62 REVISED STATUTES § 5198 (1878) 11
62 REVISED STATUTES § 5242 (1878) 11, 13, 15, 21, 22
12 U.S.C. § 86 (1970) 11
12 U.S.C. § 91 (1970) 2, 6, 11, 15, 21, 25, 26, 27, 29, 30, 32
12 U.S.C. § 94 (1970) 11, 12, 27, 28
15 U.S.C. § 78aa (1970) 29
T.C.A. § 23-2401 (1955) 27
T.C.A. §§ 64-1101 *et seq.* (1976) 4
T.C.A. § 35-501 (Supp. 1976) 5

OTHER AUTHORITIES

ANNOT., *Liability of Mortgagee for Damage Because of Wrongful Foreclosure or Improper Execution of Rightful Foreclosure*, 108 A.L.R. 592 (1937) 26
ANNOT., *Remedy of, and Damages Recoverable by, Mortgagor in Case of a Premature Sale Under Mortgage*, 97 A.L.R. 1059 (1935) 26
179 CONGRESSIONAL GLOBE, 870, 893 (1873) 8
180 CONGRESSIONAL GLOBE 2117, 2210 (1873) 8
DWAN & FEIDLER, *The Federal Statutes—Their History and Use*, 22 MINN.L.REV. 1008 (1938) 10
F. FRANKFURTER, *Some Reflections on the Reading of Statutes*, 47 COLUM.L.REV. 527 (1947) 31
NOTE, *Congressional Reversal of Supreme Court Decisions: 1945-1957*, 71 HARV.L.REV. 1324 (1958) 31
M. PRICE & H. BITNER, EFFECTIVE LEGAL RESEARCH (1953) 10
SENATE BILL No. 1378, *enacted as* Act of March 3, 1873, ch. 269, 17 Stat. 603 ..... 7, 8
TENTH ANNUAL REPORT OF THE COMPTROLLER OF THE CURRENCY (1872) 9
U.S. CONST. ART. VI 27

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-674

THIRD NATIONAL BANK IN NASHVILLE,
Petitioner,

vs.

IMPAC LIMITED, INC., et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court for the State of Tennessee, reported at 541 S.W.2d 139 (Tenn. 1976), appears at pages 70-78 of the Appendix (hereinafter "App."). The Chancellor's order granting Respondents' application for a temporary injunction is unreported and appears at App. 56. The Chancellor's unreported memorandum and order dissolving the temporary injunction and granting Respondents leave to perfect an interlocutory appeal to the Supreme Court of Tennessee appear at App. 65, 68.

JURISDICTION

The final order of the Supreme Court of Tennessee was entered on August 16, 1976 (App. 79). The petition for a writ of certiorari was filed on November 15, 1976 and was granted on January 10, 1977. 97 S.Ct. 731 (1977). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) (1970).

QUESTION PRESENTED

Whether, in light of 12 U.S.C. § 91 (1970) and *Pacific National Bank of Boston* v. *Mixter,* 124 U.S. 721 (1888), a state court has jurisdiction prior to a final judgment to enjoin a national banking association from foreclosing on its collateral.

STATUTE INVOLVED

Petitioner relies on Section 91 of the National Bank Act, 12 U.S.C. § 91 (1970), which provides as follows:

> All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this

> chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; *and no attachment, injunction, or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court.* (Emphasis added).

SUMMARY OF THE CASE

This case arises from Petitioner's attempt to foreclose against collateral that secures a $700,000 construction loan upon which Respondents had defaulted. The relevant uncontroverted facts are as follows:

1. Petitioner is a national banking association organized under the National Bank Act and located in Nashville, Tennessee.

2. On May 18, 1973, Petitioner agreed to lend Respondents $700,000 to finance the construction of an office building. Respondents executed a deed of trust encumbering the real property and improvements in favor of Petitioner to secure the construction loan. Prior to borrowing the construction money from Petitioner, Respondents had arranged for First and Mid-South Mortgage Company to provide permanent financing upon completion of the building. (See the Permanent Lender's commitment letter at App. 9-12.) Petitioner was to provide only a construction loan of a limited duration as evidenced by the three-party agreement among Respondents ("Borrower"), Petitioner ("Temporary Lender"), and First and Mid-South Mortgage Company ("Permanent Lender") (App. 15-21). Pursuant to this agreement, Petitioner made a "pre-closed"

construction loan which assisted the borrower by insuring the primacy of the deed of trust over any liens or other adverse claims that might attach to the realty after construction began but before the permanent loan was funded and secured.[1]

3. Petitioner and the Permanent Lender twice agreed to honor Respondents' requests for extensions of time. Petitioner's original loan to Respondents matured on May 30, 1974 but was extended until December 2, 1974. A second extension was granted until March 14, 1975. Although Petitioner agreed to extend the loan a third time until July 31, 1975, Respondents failed to pay (and have never paid) the agreed upon extension fee. A more complete account of the loan appears at App. 37-47. Notwithstanding these extensions, the commitment for permanent financing expired on July 31, 1975. The Permanent Lender refused to make the permanent loan to Respondents based upon its determination that Respondents had not satisfied numerous necessary conditions (App. 48-53).

4. As of August 1, 1975, Respondents ceased paying interest due on the construction loan. On September 4, 1975, Petitioner, through its attorneys, notified Respondents that foreclosure proceedings would be commenced unless Respondents paid the principal, accrued interest and an

1. Under Tennessee's Mechanic's and Materialmen's lien statute, T.C.A. §§ 64-1101 *et seq.* (1976), a lien for services performed or materials supplied relates back, for purposes of establishing priority, to the date of the first visible commencement of operations at the job site. Consequently, a deed of trust recorded after work has commenced is subordinate to all liens filed against the project. In a "pre-closed" loan the permanent lender simply purchases the construction lender's note and deed of trust and thereby preserves the priority of the original deed of trust. This procedure also spares the borrower the expense of re-recording the deed of trust and paying the real estate transfer tax a second time.

unpaid extension fee (App. 47). The notice of foreclosure was first published on September 23, 1975.[2]

5. On September 26, 1975 Respondents filed a complaint in the Chancery Court of Davidson County, Tennessee seeking to restrain Petitioner from foreclosing under its deed of trust. At an *ex parte* hearing, the Chancellor issued a restraining order and ordered Petitioner to appear and show cause why a temporary injunction should not issue.

6. At the show cause hearing held October 14, 1975, the Chancellor issued a temporary injunction restraining Petitioner from foreclosing Respondents' commercial property (App. 56).

7. Petitioner immediately moved the Court to dissolve the injunction for lack of subject matter jurisdiction. In a memorandum filed December 9, 1975 and an order entered January 8, 1976, the Chancellor concluded that Section 91 of the National Banking Act "remove[s] the jurisdiction of the Court to grant temporary injunctions prohibiting the foreclosure of property in which the bank

2. In Tennessee, foreclosure under a deed of trust is not a judicial proceeding. Tennessee law recognizes the enforcement of a mortgage by means of a power of sale conferred on a trustee in a deed of trust executed by the mortgagor. The deed of trust enables the mortgagor, by contract, to convey legal title to a trustee for the purpose of securing the mortgagor's debt to the beneficiary of the conveyance. In the event the mortgagor fails to discharge the debt, or otherwise defaults under the deed of trust, the trustee is authorized and can be compelled by the beneficiary to sell the property conveyed in trust free of the mortgagor's equity of redemption.

T.C.A. § 35-501 (Supp. 1976) prescribes the publication of notice of foreclosure: "In any sale of land to foreclose a deed of trust, mortgage or other lien securing the payment of money or other thing of value or under judicial orders or process, advertisement of such sale shall be made at least three (3) different times in some newspaper published in the county where the sale is to be made. The first publication shall be at least (20) days previous to the sale . . . ."

has a security interest," dissolved the injunction, and granted Respondents leave to perfect an interlocutory appeal to the Supreme Court of Tennessee (App. 65-69).

8. With one justice dissenting and one not participating, the Supreme Court of Tennessee, *held, reversed.* Section 91 of the National Bank Act does not bar a state court from issuing a temporary injunction restraining a national bank from foreclosing on its collateral prior to a final judgment (App. 70).

9. This Court granted the petition for a writ of certiorari on January 10, 1977. 97 S.Ct. 731 (1977).

THE LEGISLATIVE HISTORY OF SECTION 91 OF THE NATIONAL BANK ACT

Section 91, in its present form, is the hapless progeny of inartful statutory codification. The legislative history of the anti-prejudgment injunction provision (hereafter referred to as "the anti-injunction proviso") demonstrates that, in this instance, the codifiers and revisers of the Acts of Congress have made the judiciary's task unnecessarily complicated, if not tedious.

By adopting Section 57 of the Act of June 3, 1864, Congress subjected national banks to suit in state courts.[3] The anti-injunction proviso (now an appendage to 12 U.S.C. § 91) was enacted in 1873 as an amendment to Section 57, to limit the remedies which state courts could grant against national banks prior to final judgment.

Section 57 originally read:

> That suits, actions, and proceedings against any association under this Act, may be had in any circuit,

3. Act of June 3, 1864, ch. 106, § 57, 13 Stat. 116.

> district, or territorial court of the United States held within the district in which such association may be established; or in any state, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases; *Provided, however,* That all proceedings to enjoin the comptroller under this Act shall be had in a circuit, district, or territorial court of the United States, held in the district in which the association is located.

The anti-injunction proviso of the 1873 Amendment to Section 57 read:

> *And provided further,* That no attachment, injunction, or execution shall be issued against such association, or its property, before final judgment in any such suit, action or proceeding in any state, county, or municipal court.[4]

4. Act of March 3, 1873, ch. 269, § 2, 17 Stat. 603.

The anti-injunction proviso was introduced by Senator Sherman as part of Senate Bill No. 1378 which, in its entirety, read as follows:

An Act to require National Banks to restore their capital when impaired, and to amend the National Currency Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all national banks which shall have failed to pay up their capital stock, as required by law, and all national banks whose capital stock shall have become impaired by losses or otherwise, shall, within three months after receiving notice thereof from the Comptroller of the Currency, be required to pay the deficiency in the capital stock by assessment upon the shareholders pro rata, for the amount of capital stock held by each and the Treasurer of the United States shall withhold the interest upon all bonds held by him in trust for such association, upon notification from the Comptroller of the Currency, until otherwise notified by him; and if such banks shall fail to pay up their capital stock, and shall refuse to go into liquidation, as provided by law, for three months after receiving notice from the Comptroller, a receiver may be appointed to close up the business of the association, according to the provisions of the fiftieth section of the national currency act.

(Footnote continued on following page)

The Congressional Globe indicates that Senate Bill No. 1378, which contained the anti-injunction proviso was passed after its third reading by the Senate on January 27, 1873, without discussion. 179 CONG. GLOBE 870, 893 (1873). The bill was passed by the House without discussion on March 3, 1873, and was signed by President Grant later that day as Chapter CCLXIX of the Laws of the United States. 180 CONG. GLOBE 2117, 2210. 17 Stat. 603 (1873).

The caption of the 1873 Act is twofold: "[T]o require national banks to restore their capital when impaired, *and* to amend the National Currency Act" (emphasis added).

(Continued from previous page)

SEC. 2. That section fifty-seven of said act be amended by adding thereto the following: "*And provided further*, That no attachment, injunction, or execution shall be issued against such association, or its property, before final judgment in any such suit, action, or proceeding in any State, county, or municipal court."

SEC. 3. That all banks not organized, and transacting business under the national currency act, and all persons, companies or corporations doing the business of bankers, brokers, or savings institutions, except savings banks, authorized by Congress to use the word "national" as a part of their corporate name, are prohibited from using the word "national" as a portion of the name or title of such bank, corporation, firm, or partnership; and every such bank, corporation, or firm, which shall use word "national" as a portion of their corporate title or partnership name six months after the passage of this act, shall be subject to a penalty of fifty dollars for each day thereafter in which such word shall be employed as aforesaid as part of such corporate name or title, such penalty to be recovered by action in any court having jurisdiction.

SEC. 4. That it shall be the duty of the Comptroller of the Currency to cause to be examined each year the plates, dies, but-pieces and other material from which the national bank circulation is printed in whole or in part, and file in his office annually a correct list of the same; and such material as shall have been used in the printing of the notes of national banks which are in liquidation, or have closed business, shall be destroyed under such regulations as shall be prescribed by the Comptroller of the Currency, and approved by the Secretary of the Treasury; and the expense of such examination and destruction shall be paid out of any appropriation made by Congress for the special examination of national banks and bank plates.

The 1873 Act addresses four legally distinct aspects of the regulation of national banks: (1) correcting the impairment of capital stock; (2) prohibiting state court injunctions, attachments and executions prior to final judgment; (3) prohibiting non-national banking associations from using the word "national" in their business name or title; and (4) regulating the materials used to print national currency.

It is significant that John Jay Knox, the Comptroller of the Currency, did not request the anti-injunction proviso in his annual reports to the Congress which dealt, primarily, with the status of insolvent and failing national banks. *See, e.g.*, TENTH ANNUAL REPORT OF THE COMPTROLLER OF THE CURRENCY (1872).

In the process of codification, Section 57 of the National Bank Act of 1864, as amended by the anti-injunction proviso of 1873, disintegrated.

In the Revised Statutes of 1873 the venue provisions of Section 57, but not the anti-injunction proviso, were deleted from the Banking Code and transferred to the Judiciary Code.[5] It is significant that the list of "Acts and Parts of Acts Examined in the Revision of this Title [the Judiciary Code]" does not include the Act of March 3, 1873 (the anti-injunction proviso).[6]

Similarly, a search of the 1873 revision of the Banking Code (Title 65) reveals that the Act of March 3, 1873 was not among the acts considered by the Commission charged with the task of revising the Code. *See* 2 REVISED STATUTES OF 1873, Title LXV, ch. IV at 52 (1873).

---

5. 1 REVISED STATUTES OF 1873, Title XIII, ch. III, Sec. 34(15) and ch. VII, Sec. 100(9) & (10) (1873).

6. 1 REVISED STATUTES OF 1873, Title XIII, ch. XXI at 263-75 (1873). The list of Acts, chronologically stated, stops with the Act of May 8, 1872.

Scholars agree that the 1873 revision of the Statutes at Large was not an overwhelming success. Messrs. Jacobstein and Mersky, in their introduction to the two volume set of the Revised Statutes of 1873, describe it as an "unhappy experience in statutory revision," while Professors Price and Bitner note that "the revision aroused so much dissatisfaction, because of errors in it and of the feeling that the revisers in many instances had exceeded their authority, that a second edition was published in 1878." M. Price & H. Bitner, EFFECTIVE LEGAL RESEARCH 29 (3rd ed. 1969).[7] *See also* DWAN & FEIDLER, *The Federal Statutes—Their History and Use*, 22 MINN. L. REV. 1008 (1938).

The 1873 reviser's failure to include the anti-injunction proviso to Section 57 was obviously an oversight, for in the Revised Statutes of 1875 it reappears, curiously enough, at the tail end of Section 52 of the Act of 1864 (which voided transfers of certain assets by insolvent national banks) as Section 5242 of Title 62 of the Revised Statutes of 1875.[8]

---

7. The second edition was never re-enacted into positive law and is, therefore, "only *prima facie* the law, rebuttable by reference to the amending statute published in the Statutes at Large from which derived." PRICE & BITNER, *Id.*

8. Sec. 52 originally read: "That all transfers of the notes, bonds, bills of exchange, and other evidences of debt owing to any association, or of any deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, with a view to prevent the application of its assets in the manner prescribed by this Act, or with a view to the preference of one creditor to another, except in the payment of its circulating notes, shall be utterly null and void." Act of June 3, 1864, ch. 106, § 52, 13 Stat. 115.

Meanwhile, the venue provisions of Section 57 were returned to the Banking Code.[9] Unfortunately, in its haste to correct the 1873 Revision, Congress placed the Section 57 venue provisions at the end of what was Section 30 of the 1864 Act (Section 5198 of the Revised Statutes), which dealt with usurious interest charges by national banks.

By 1878 the revisers had managed to completely mangle the codification of the law. Title 62 of the Revised Code of 1878 shows the venue provisions of Section 57 attached as a separate sentence to a section dealing with usury (§ 5198) and the anti-injunction proviso of Section 57 appended by a mere semicolon to a section voiding transfers by insolvent national banks (§ 5242).[10]

Unfortunately, the confusion of the Revised Statutes was carried forward to some degree to the United States Code. For example, 12 U.S.C. § 91 restates verbatim the transfers by insolvent banks/anti-injunction melange of Section 5242 of the Revised Statutes of 1878.

On the other hand, the hapless union of the venue provisions of Section 57 and the usury provisions of Section 30 has been dissolved. Today the usury provisions appear as Section 86 of the National Bank Act, 12 U.S.C. § 86 (1970), while the venue provisions now stand alone as Section 94 of the National Bank Act, 12 U.S.C. § 94 (1970). Accordingly, it remains for this Court to read the anti-injunction proviso in its proper context as though

---

9. Act of Feb. 18, 1875, ch. 80, 18 Stat. 320. Justice Holmes concluded that Section 57 had been "omitted by mistake from the Revised Statutes" but that "[T]his omission was corrected" by 18 Stat. 320. *Freeman Mfg. Co.* v. *National Bank of the Republic of Boston*, 160 Mass. 398, 35 N.E. 865, 866 (1894).

10. Revised Statutes of the United States, Title LXII, ch. III, Sec. 5198 at 1005 and ch. IV, Sec. 5242 at 1013-14 (1878).

it were placed alongside the venue provisions of Section 57, now 12 U.S.C. § 94 (1970).[11]

ARGUMENT

I.

The Decision Of The Tennessee Supreme Court Overrules Holdings Of The United States Supreme Court.

Although this Court has interpreted the anti-injunction proviso on three separate occasions, the thrust of these opinions was ignored by the Tennessee Supreme Court.

A. The Mixter Decision

The case of *Pacific National Bank of Boston* v. *Mixter*, 124 U.S. 721 (1888) stands for the proposition that the anti-attachment/injunction proviso "as it stood originally as part of Section 57 after 1873, and as it stands now in the Revised Statutes" operates as a prohibition on prejudgment attachments (and injunctions) issued against national banks by state courts. 124 U.S. at 726.

The *Mixter* case arose when George Mixter and others sued the Pacific National Bank of Boston and attached large deposits owned by the defendant in the possession of other banks. To alleviate the adverse impact of the attachment, the Pacific National Bank agreed to execute a bond in favor of Mixter and other plaintiffs. The bond, in turn, was secured by the guaranties of two individuals. To insure that the individual guarantors would be indemnified if called on to perform, the bank transferred to them a large certificate of deposit (later replaced by securities). As agreed, when the bond was executed and secured, the attachment was dissolved. Thereafter, the Comptroller of the Currency placed the bank in the hands of a Receiver for purposes of liquidation. The Receiver unsuccessfully sought the dismissal of the cases brought by Mixter and others. After several of the plaintiffs reduced their claims to judgment, the Receiver filed a bill in equity to recover the bank's securities held by the sureties and to have the bond and the sureties' obligations declared void on the grounds that the original attachment was illegal and void under Section 5242 of the Revised Statutes.

11. It is not surprising that Congress has not adopted Title 12 of the United States Code as positive law.

On appeal, Mixter claimed that the anti-prejudgment attachment/injunction proviso was not controlling because Section 5242 concerns only insolvent banks, whereas the Pacific National Bank was solvent when the attachment issued. The Court's analysis of Mixter's arguments squarely controls this appeal:

> The fact that the amendment of 1873 in relation to attachments and injunctions in state courts was made a part of Section 5242 shows the opinion of the revisers and of Congress that it was germane to the other provision incorporated in that section, and was intended as an aid to the enforcement of the principle of equality among the creditors of an insolvent bank. But however that may be, it is clear to our minds that, as it stood originally as part of Section 57 after 1873, and as it stands now in the Revised Statutes, it operates as a prohibition upon all attachments against national banks under the authority of the state courts. That was evidently its purpose when first enacted, for then it was part of

a section which, while providing for suits in the courts of the United States or of the State, as the plaintiff might elect, declared in express terms that if the suit was begun in a state court no attachment should issue until after judgment. *The form of its re-enactment in the Revised Statutes does not change its meaning in this particular. It stands now, as it did originally, as the paramount law of the land that attachments shall not issue from state courts against national banks, and writes into all state attachment laws an exception in favor of national banks. Since the Act of 1873 all the attachment laws of the State must be read as if they contained a provision in express terms that they were not to apply to suits against a national bank.*

• • •

Although the provision was evidently made to secure equality among the general creditors in the division of the proceeds of the property of an insolvent bank, its operation is by no means confined to cases of actual or contemplated insolvency. The remedy is taken away altogether and cannot be used under any circumstances.

It was further said that if the power of issuing attachments has been taken away from the state courts, so also is the power of issuing injunctions. That is true. (Emphasis added). 124 U.S. at 726-27.

Mr. Chief Justice Waite concluded that since the attachment was illegal and the bond was simply a substitute for the attachment, the bond was unenforceable. Accordingly, the case was reversed and remanded.

B. The Earle Decision

The Court had a second occasion to review Section 5242 (now 12 U.S.C. § 91 (1970)) in *Earle* v. *Pennsylvania*, 178 U.S. 449 (1900). The *Earle* case arose when the State of Pennsylvania, having obtained a judgment for $31,499 against James Long, obtained an alias writ against Mr. Long's bank, the Chestnut Street National Bank of Philadelphia, as garnishee. The bank filed an answer to the proceeding and an answer to special interrogatories admitting that it held funds for Long's benefit. A few days later the bank closed its doors and the Comptroller of the Currency appointed Mr. Earle as its Receiver. Mr. Earle moved the Court of Common Pleas to vacate the attachment served upon the bank-garnishee under Section 5242 of the Revised Statutes. His motion was denied and the Court ordered the bank to pay over a deposit of $2,900 with interest and the value of stock it held as collateral in excess of Long's debt to the bank. The Supreme Court of Pennsylvania affirmed. The United States Supreme Court affirmed in part and reversed in part. The opinion, written by Mr. Justice Harlan, does not discuss the legislative history of the proviso and cites no cases. It simply holds:

> Whatever may be the scope of section 5242, an attachment sued out against the bank *as garnishee* is not an attachment against the bank or its property, nor a suit against it, within the meaning of that section. It is an attachment to reach the property or interests held by the bank for others. 178 U.S. at 454.

Significantly, the Court reversed that part of the decision ordering the payment of interest accrued on Long's deposit and ordering the sale of stock held by the bank as pledgee.

Earle is not inconsistent with *Mixter*. The attachment did not affect the bank's pecuniary interests. The bank was a mere stakeholder holding funds belonging to another. The fact that the bank was a mere garnishee and not a party to the controversy is controlling. Indeed, that part of the trial court's order which would have affected the bank's ability to deal with its own collateral was reversed; the attachment was sustained only insofar as it affected Mr. Long's deposit in which the bank claimed no interest.

C. The Van Reed Decision

In any event, the Supreme Court quickly laid to rest any possibility that its holding in *Earle* might overrule or seriously limit the *Mixter* decision in the case of *Van Reed* v. *People's National Bank*, 198 U.S. 554 (1905). This case arose when Mr. Van Reed commenced an action against the People's National Bank of Lebanon, Pennsylvania by levying an attachment upon the bank's funds in New York. The bank, which was solvent, appeared specially and moved to vacate the attachment pursuant to section 5242 of the Revised Statutes. Its motion was denied, but the Appellate Court reversed and both the Court of Appeals of New York and the Supreme Court of the United States, speaking unanimously through Mr. Justice Day, affirmed. One of two questions raised on appeal was whether a national bank is "exempt from attachment before judgment under section 5242":

> We deem the answer to the first question already determined by the decision of this court in *Pacific Nat. Bank* v. *Mixter*, 124 U.S. 721, 31 L.Ed. 567, 8 Sup. Ct. Rep. 718. The right of Congress to determine to what extent a state court shall be permitted to entertain actions against national banks, and how far these institutions shall be subject to state control, is

> undeniable. National banks are quasi-public institutions, and for the purpose for which they are instituted are national in their character, and, within constitutional limits, are subject to the control of Congress, and are not to be interfered with by state legislative or judicial action, except so far as the lawmaking power of the government may permit.
>
> • • •
>
> The language of the latter clause of this section [the anti-attachment/injunction proviso] would seem to be too plain to admit of discussion as to its meaning. It in terms forbids the issuing of an attachment, injunction, or execution against a national bank or its property before final judgment in any suit, action, or proceeding in any state, county, or municipal court. This was the view taken by this court in *Pacific Nat. Bank* v. *Mixter* . . . .
>
> • • •
>
> Since the rendition of that decision it has been generally followed as an authoritative construction of the statute holding that no attachment can issue from a state court before judgment against a national bank or its property. [Citations omitted]. It is argued by the plaintiff in error that the decision in the *Mixter Case*, . . . should be limited to cases where the bank is insolvent; but the statement of facts in that case shows that, at the time when the attachment was issued, the bank was a going concern and entirely solvent so far as the record discloses. The language of Chief Justice Waite, above quoted, is broad and applicable to all conditions of national banks, whether solvent or insolvent; and there is nothing in the statute, which is likewise specific in its terms, giving the right

of foreign attachment as against solvent national banks. *We find nothing in the case of Earle* v. *Pennsylvania,* 178 U.S. 449, 44 L.Ed. 1146, 20 Sup. Ct. Rep. 915, *which qualifies the decision announced in the Mixter Case.* We therefore conclude that the Mixter Case is applicable here, and the decision therein announced meets with our approval. 198 U.S. at 557-59. (Emphasis added).

The Court's interpretation of the anti-attachment/injunction proviso in *Mixter, Earle* and *Van Reed* has been followed almost universally by the lower courts.

D. Lower Court Decisions

Not surprisingly, the most widely cited opinion on point is *Freeman Mfg. Co.* v. *National Bank of the Republic of Boston,* 160 Mass. 398, 35 N.E. 865 (1894), written by Mr. Justice Holmes. In *Freeman,* plaintiffs, having executed promissory notes in favor of the Potter Lovell Company, obtained a preliminary injunction against the bank enjoining it from transferring their notes which the payee, allegedly, had wrongfully pledged to the bank. The Superior Court dissolved the injunction, but one Justice of the Supreme Judicial Court of Massachusetts suspended the decrees of the Superior Court and the bank appealed. Characteristically, Justice Holmes disposed of the legal issue efficiently and correctly:

> In Rev. St. U.S. § 5242, after provisions avoiding payments made in contemplation of insolvency, etc., the section continues: "And no attachment, injunction or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any state, county, or municipal court." Possibly these words, if enacted in their pres-

> ent connection for the first time, might be limited to insolvent banks. Raynor v. Bank, 93 N.Y. 371. But this clause is simply a codification of a proviso added to Stat. U.S. 1864, c. 106, § 57 (13 Stat. 116, 117), giving jurisdiction over banks to state, as well as to United States, courts, by Stat. U.S. 1873, c. 269, § 2 (17 Stat. 603). It cannot be limited in that way. Bank v. Mixter, 124 U.S. 721, 726, 727, 8 Sup. Ct. 718. There is nothing in the context to limit it in any other. The argument is only that it is unreasonable that Congress should go so far; that the presumable motive for the law was to prevent an important wheel of business being stopped; and that this motive could be satisfied by limiting the injunctions mentioned to such as would place the general assets of the bank beyond its control, by mesne process having the effect of an attachment.
>
> But such arguments are very doubtful ground for giving words an unnatural construction. The words used are of unlimited scope. The limited interpretation gives them an unusual meaning. The prohibition, whether reasonable or not, is intelligible when we consider that, at the time when the prohibition was first passed, any plaintiff was at liberty to sue in the United States courts, and could obtain an injunction there. The fact that this power has been taken away cannot change the construction of the words. Bank v. Mixter, 124 U.S. 721, 727, 728, 8 Sup.Ct. 718. The jurisdiction and the extent of the power to be exercised by state courts depend on the permission of the United States. The wrongs likely to be done by national banks are of a pecuniary nature, and the banks usually are amply able to make good any damage which they may do, so that

there is not the same necessity for preventive remedies that there is with individuals or with corporations, for whose solvency less stringent precautions are taken. We are of opinion that the language of the statute must be read in its natural sense, in accordance with what we understand to have been the view of the supreme court of the United States in Bank v. Mixter, supra. 35 N.E. at 866.

Other decisions holding that Section 91 deprives state courts of subject matter jurisdiction to temporarily enjoin a national bank from foreclosing on its collateral include *First National Bank of Oakland* v. *Superior Court of California*, 240 Cal. App.2d 109, 49 Cal. Rptr. 358, *cert. denied*, 385 U.S. 829 (1966); *Kemple* v. *Security First National Bank of Los Angeles*, 57 Cal. Rptr. 838 (1967); *National Bank of Savannah* v. *Craven*, 147 Ga. 753, 95 S.E. 246 (1918); *Metropolitan Lumber Co.* v. *Fordham National Bank in New York*, 102 N.J.Eq. 514, 141 A. 742 (1928).

In *First National Bank of Oakland* v. *Superior Court of California, supra*, the bank and the Northern California Business Investment Company were beneficiaries of separate deeds of trust encumbering all or part of the same property. They disagreed on the question of priority. When the mortgagor defaulted under both deeds of trust, the investment company obtained a temporary restraining order prohibiting a foreclosure sale by the bank under its deed of trust. At the hearing to dissolve the temporary restraining order, which took place shortly before the scheduled hour of sale, the court asked the bank to delay for two hours while it reviewed the bank's authorities and attended to other matters. When the bank refused, the court refused to dissolve its restraining order. Nevertheless, the bank conducted the sale and bid in the property. After a hearing on an order to show cause the Superior Court held the bank in contempt, fined it $500 and vacated the sale. The Appellate Court annulled the Superior Court's contempt orders on the ground that it acted "beyond its jurisdiction" in issuing the temporary restraining order.[12]

In *Kemple* v. *Security First National Bank of Los Angeles*, 57 Cal. Rptr. 838 (1967) the court held that the trial court properly denied plaintiffs' motion for a preliminary injunction because it lacked jurisdiction to temporarily restrain a national bank from foreclosing under the terms of its deed of trust, notwithstanding the plaintiffs' claim that they were fraudulently induced to sign an agreement which subordinated their vendors' lien and right of re-entry to the bank's deed of trust.

In *National Bank of Savannah* v. *Craven*, 147 Ga. 753, 95 S.E. 246 (1918) the plaintiff-mortgagor interpleaded the amount of the debt and sought a temporary injunction to enjoin the mortgagee, a national bank, from foreclosing under a power of sale contained in the mortgage securing the debt. The Supreme Court of Georgia *held*, the prohibitory language in Section 5242 prevents an injunction prior to a final judgment in the case.

Similarly, in *Metropolitan Lumber Co.* v. *Fordham National Bank in New York*, 102 N.J.Eq. 514, 141 A. 742 (1928) the lower court was required to dismiss a bill to

---

12. "Although the earlier clauses of the same section deal with insolvent national banks, the legislative history makes clear that this qualification does not limit the last clause (of Section 91). The proscription of state court attachment or injunction before final judgment 'is by no means confined to cases of actual or contemplated insolvency.' Rather, it bars the interim remedy in state courts as to any national bank."

The Court did not set aside the order vacating the sale holding that Section 91 does not remove this remedy from state courts.

temporarily enjoin a national bank from exercising its rights under a mortgage and an assignment of rents based on *Mixter, supra, Van Reed, supra,* and *Freeman Mfg. Co., supra.*

The clear meaning of the statute, which was correctly expressed in *Mixter,* has been applied practically without exception by the lower federal and state courts in this country. *See, e.g.,* Robinson v. First National Bank of Plainview, 45 F.2d 613 (N.D. Tex. 1930), *aff'd on other grounds,* 55 F.2d 209 (5th Cir. 1932) (dissolving temporary injunction); Garner v. Second National Bank of Providence, 66 F. 369 (C.C.S.D. N.Y. 1895) (holding service of process by means of prejudgment attachment of bank's assets void under Section 5242 and vacating the attachment); Dennis v. First National Bank of Seattle, 127 Cal. 453, 59 P. 777 (1899) (affirming order dissolving prejudgment attachment); Hill v. First National Bank, 163 Ga. 458, 136 S.E. 437 (1927) (upholding trial court's refusal to issue preliminary injunction); American National Bank of Macon v. Dure, 148 Ga. 498, 97 S.E. 70 (1918) (prejudgment injunction dissolved); Planters' Loan & Savings Bank v. Berry, 91 Ga. 264, 18 S.E. 137 (1893) ("This policy may be wise or unwise, wholesome or unwholesome, but in either event it is the one established by competent legislative authority, and must be respected and enforced accordingly."); Meyer v. First National Bank of Coeur d'Alene, 10 Idaho 175, 77 P. 334 (1904) (affirming dissolution of preliminary injunction); Miller v. Mercantile National Bank of Hammond, 234 Ind. 202, 125 N.E.2d 720 (1955) (sustaining demurrer to complaint seeking temporary injunction to prevent national bank from disposing of account balance); Chesapeake Bank v. The First National Bank of Baltimore, 40 Md. 269, 17 Am. Rep. 601

(1874);[13] First National Bank v. La Due, 39 Minn. 415, 40 N.W. 367 (1888) (declaring void a prejudgment attachment of bank funds); Rosenheim Real-Estate Co. v. Southern National Bank, 46 S.W. 1026 (Tenn.Ch.App. 1897) (vacating prejudgment attachment); Safford v. First National Bank, 61 Vt. 373, 17 A. 748 (1889) (reversing judgment overruling bank's motion to dismiss pre-judgment attachment as a means to obtain service of process).

E. The Decision Below

Without so much as a cursory examination of either the plain language of the anti-injunction proviso or its legislative history, the Tennessee Supreme Court summarily disregarded the well-developed body of case law correctly applying it.[14] Without citing authority in the

---

13. The *Chesapeake Bank* case is interesting because it was decided only one year after the anti-attachment/injunction proviso was enacted, and 14 years prior to *Mixter.* The decision also precedes the unfortunate codification efforts of the Revised Statutes of 1873, which were not published until 1875. The opinion correctly treats the anti-attachment proviso as an amendment to Section 57 of the National Bank Act of 1864 and holds that "the power to create these banks as instrumentalities of the government, being, as it confessedly is, within the rightful powers of Congress, we cannot say that provisions like these defining in what tribunals they shall be sued and to what suits or actions they shall be subjected, are not appropriate and necessary to carry out this admitted power. It must plainly appear that such provisions are inappropriate and unnecessary for this purpose, in order to justify a court in declaring that Congress has transcended its authority in enacting them. In our opinion Congress has the power to make any provisions which tend to promote the efficiency of these banks in performing the functions by which they were designed to serve the Government, and to protect them, not only against interfering State legislation, but also against suits or proceedings in state courts by which that efficiency would be impaired." 40 Md. at 272-73.

14. The Court avoids the impact of *Mixter* and its progeny by reading *Earle* v. *Pennsylvania, supra,* to limit the holding in *Mixter* to its facts and by concluding that the numerous decisions following *Mixter* are based on "blind reliance on *dicta* in the federal cases." In light of the actual holding in *Earle,* which upheld

(Footnote continued on following page)

language of the statute or the cases construing it, the Tennessee Court concluded that the anti-injunction proviso is limited to instances in which a national bank's creditor endeavors to reach its assets. The Tennessee Court held that the anti-injunction proviso does not apply to "a situation in which a debtor of a national bank is seeking, by interlocutory injunction, to protect *his* property from wrongful seizure and foreclosure by the bank." (App. 73).

The anti-injunction proviso affords absolutely no basis for sophistic distinctions between actions brought by a creditor from actions brought by a debtor. In either case, the bank's property rights may be imperiled. As Justice Brock noted in his dissent:

> The distinction made in the majority opinion be-between state court actions brought by *debtors* of a national bank and those brought by *creditors* of a national bank is, in my opinion, not a valid one because the harm to the national bank defendant is the same whether the injunction is sought by a debtor or a creditor. [Citing authorities] A temporary injunction by a debtor restraining foreclosure of a deed of trust belonging to the bank constitutes interference with the assets of the bank in the same way as does an attachment by a creditor of the same deed of trust (App. 78).

A preliminary injunction against a lender restraining its rights of foreclosure is a judicial act which clearly interferes with the bank's property rights and with the

---

(Continued from previous page)

the garnishment of a depositor's account in which the national bank-garnishee claimed no interest but reversed the garnishment insofar as it affected the bank's disposition of its collateral, the Court's reliance on *Earle* appears misplaced. In any event, the Court evidently overlooked the *Van Reed* decision which states that *Earle* in no way limits *Mixter*.

bank's management and control of its assets. A preliminary injunction against a bank's contractual right of foreclosure is as much an action against a bank's assets as was the illegal attachment of the bank's funds in the *Mixter* and *Van Reed* cases. In many instances the harm which results from unwarranted and precipitous interference with collateral held by a national bank is as great as the harm from interference with a bank's own funds.

In an effort to justify its result, the Tennessee Supreme Court adverted to certain factors which bear upon the wisdom of the anti-injunction proviso.[15] Among these

---

15. Respondents' Brief in Opposition to the Petition for Writ of Certiorari cites four cases to support the proposition that Section 91 does not deprive state courts of subject matter jurisdiction to temporarily enjoin a national bank from foreclosing on its collateral: *Prentiss* v. *Chandler*, 85 F.2d 733 (9th Cir. 1936); *Uhl* v. *First National Bank & Trust Co. of Kalamazoo*, 24 F.Supp. 275 (W.D. Mich. 1935); *Drewes & Co.* v. *Ham and Seymour*, 103 So. 241 (La. 1925); and *State ex rel. Southern Alaska Canning Co.* v. *Superior Court for King County*, 222 P. 203 (Wash. 1924).

However, *Prentiss* v. *Chandler*, *supra*, and *Uhl* v. *First National Bank and Trust Co. of Kalamazoo*, *supra*, concern Section 52 of the original Bank Act, which came in as the voidable transfers portion of Section 91. Neither case involves the Section 57 portion of 12 U.S.C. § 91 proscribing temporary injunctions.

The case of *Drewes & Co.* v. *Ham and Seymour*, *supra*, held that a state court may temporarily enjoin a national bank from paying a draft against a letter of credit as ancillary relief in an action brought by the maker of the credit against the beneficiary. The case is distinguishable from the case of a national bank foreclosing on its collateral: "The main object of the suit is to annul the contract between the plaintiff and Ham & Seymour in which the bank has no direct or pecuniary interest and with which the bank has no concern." 103 So. at 244. Thus, as in *Earle* v. *Pennsylvania*, *supra*, the bank was a disinterested stakeholder, which differs markedly from a mortgagee.

In *State ex rel. Southern Alaska Canning Co.* v. *Superior Court for King County*, *supra*, the Bank of California sought to foreclose a chattel mortgage by placing the notice of sale with the sheriff of King County, Washington. The mortgagor instituted a proceeding to transfer the foreclosure to the superior court of King County. The court thereupon issued a temporary

(Footnote continued on following page)

are the adequacy of other judicial remedies and the absence of federal court jurisdiction.

Even though the remedy of a temporary injunction is removed by Section 91, a national bank still must act at its peril when its foreclosure action is questioned. After a final judgment, a wrongful foreclosure may be voided and set aside. Also, a party damaged by wrongful foreclosure is entitled to money damages which is the traditional remedy for the wrongful taking of property. ANNOT., *Liability of Mortgagee for Damage Because of Wrongful Foreclosure or Improper Execution of Rightful Foreclosure*, 108 A.L.R. 592 (1937); ANNOT., *Remedy of, and Damages Recoverable by, Mortgagor in Case of a Premature Sale Under Mortgage*, 97 A.L.R. 1059 (1935).

While the Tennessee Court is correct in concluding that the federal district court would not have jurisdiction in the present case, this consideration has absolutely no bearing upon the proper construction and application of the anti-injunction proviso contained in Section 91. Mr. Justice Holmes laid this argument to a sound and solid rest in *Freeman Mfg. Co.* v. *National Bank of Boston*, 160 Mass. 398, 399, 35 N.E. 865, 866 (1894).

(Continued from previous page)

injunction staying the action of the sheriff. "The *sole question before us* is where a mortgagor has instituted proceedings to transfer to the Superior Court a pending foreclosure by notice and sale given by the sheriff of his chattel mortgage, must he give a bond before the court will restrain the sheriff from further proceedings?" 222 P. at 203. Accordingly, the Chancellor (in the instant case) concluded: "So the injunction in [the South Alaska Canning] case was not to restrain the Bank from foreclosing but was to restrain the sheriff from proceeding after, under the laws of that state, an action had been instituted to transfer the foreclosure to the Superior Court. The action was not to stop the foreclosure but to transfer it to the court." (App. 68). Thus, it is manifest that *South Alaska Canning Company* does *not* stand for the proposition that a state court has jurisdiction to temporarily enjoin a national bank from foreclosing on its collateral.

In short, while the factors addressed by the Tennessee Supreme Court might appropriately be the subject of legislative consideration bearing upon the wisdom of the statute, these factors are of no proper assistance in determining the construction of the anti-injunction proviso.

II.

The Decision Of The Tennessee Supreme Court Constitutes An Impermissible Infringement Upon The Power Of Congress To Regulate National Banks.

A. Congress, Not The States, Is Empowered To Regulate National Banks.

Since *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), when the Court declared unconstitutional a state tax on the bank of the United States, the primacy of Congress over the States with respect to the regulation of national banks has been an established doctrine of constitutional law. In addition, it is fundamental that state law must yield to the Acts of Congress when the two conflict. U.S. Const., art. VI.

In the instant case, the Tennessee Supreme Court held that the anti-injunction proviso of 12 U.S.C. § 91 (1970) must yield to Tennessee's foreclosure statute, T.C.A. § 23-2401 (1955), which confers upon Chancery Courts the power to enjoin a foreclosure sale prior to final judgment.

B. The Power To Regulate National Banks Includes The Power To Create Special Privileges And Immunities For National Banks.

Perhaps the best example of a privilege and immunity peculiar to national banks is the venue restriction contained in 12 U.S.C. § 94 (1970).

Because the venue provisions were derived from Section 57 of the National Banking Act of 1864, which Congress amended in 1873 by adding the anti-injunction proviso, the case law interpreting Section 94 is especially relevant to a consideration of Section 91.

In *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555 (1963) the Court analyzed the history of the special venue provisions of Section 94 which permit national banks to be sued in state and federal courts sitting within the district in which the association was established.

Following its holding in *First National Bank of Charlotte* v. *Morgan*, 132 U.S. 141 (1889) that Section 57 "conferred a personal privilege on the banks exempting them from suits in state courts outside their home counties," the Court concluded "that the statute must be given a mandatory reading." 371 U.S. at 561-62. This conclusion was based, in part, on the federal character of national banks best articulated in *Van Reed, supra*:

> "National banks are quasi-public institutions and for the purposes for which they are instituted are national in their character, and, within constitutional limits, are subject to the control of Congress and are not to be interfered with by state legislative or judicial action, except so far as the lawmaking power of the Government may permit." Van Reed v. People's Nat. Bank, 198 U.S. 554, 557, 49 L ed 1161, 1162, 25 S.Ct. 775. Unquestionably Congress had authority to prescribe the manner and circumstances under which the banks could sue or be sued in the courts .... 371 U.S. at 559-60.[16]

16. *See* National Bank of North America v. Associates of Obstetrics & Female Surgery, 96 S.Ct. 1632 (1976).

More recently, the controlling nature of the federal legislative policy governing national banks was noted in *Radzanower* v. *Touche, Ross & Co.*, 96 S.Ct. 1989 (1976), which held that the special venue provision found in Section 94 of the National Bank Act is not supplanted by the more general venue provision of Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa (1970).[17]

C. The Tennessee Supreme Court's Construction Of Section 91 Deprives National Banks In Tennessee Of Powers And Privileges Possessed By National Banks In Other States.

Given the consistent construction of Section 91 by the courts of many states, it is obvious that a national bank foreclosing in Tennessee is subject to restrictions it would not encounter foreclosing in Georgia, Massachusetts, or California.[18]

17. In his dissenting opinion, Justice Stevens notes:

> "The source of the special venue statute for national banks is the Act to provide a national Currency enacted in 1863 and amended in 1964. When these statutes were enacted, Congress apparently assumed that the newly authorized national banks would not be subject to suit in state courts unless Congress gave its express consent. The fact that the statute was phrased in permissive language suggests that Congress' primary purpose was to give such consent. The mandatory construction given to that language a century later when the Court decided *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, is consistent with that purpose because it is unlikely that the Civil War Congress intended to authorize the several States to subject national banks to the potential harassment of defending litigation in places other than the county or city where the bank was located." 96 S.Ct. at 1996-97.

18. The anomaly of the Tennessee Court's holding is illustrated by a hypothetical instance in which a national bank holds a mortgage on a tract of real property located in both Tennessee and Georgia. Foreclosure could not be enjoined in Georgia prior to a final judgment [Hill v. First National Bank, 163 Ga. 458, 136 S.E. 437 (1927)], but could be enjoined in Tennessee at any time, without regard to a final judgment.

The novel construction of Section 91 by the Tennessee Supreme Court creates an unwarranted inconsistency in the federal framework which the Congress has created for the regulation of its corporate creations, national banks. The Tennessee Court's construction of Section 91 is repugnant to the notion of uniformity in the federal policy of regulating legal actions against national banks.

III.

The Court Should Abide By The Established Meaning Of The Anti-Injunction Proviso And Reverse The Court Below.

The Congress spoke in plain language in 1873 when it enacted the anti-injunction proviso to limit the jurisdiction of state courts which it had conferred in 1864. The legislative history and the case law interpreting the proviso militate strongly against the construction placed upon the statute by the Tennessee Supreme Court.

The court below ignored the admonition of Justice Frankfurter:

> [T]hat the function in construing a statute is to ascertain the meaning of words used by the legislature. To go beyond it is to usurp a power which our democracy has lodged in its elected legislature. The great judges have constantly admonished their brethren of the need for discipline in observing the limitations. A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy-making might wisely suggest, construction must eschew interpolation and evisceration. He must not read in by way of creation. He must not read out except to avoid patent nonsense or internal contradiction. F. FRANKFURTER, *Some Reflections on the Reading of Statutes*, 47 COLUM.L.REV. 527, 533 (1947).

Moreover, as the Court noted in *Agricultural National Bank* v. *Tax Commissioner*, 392 U.S. 339, 345 (1968), "the banking field has traditionally been an area of particular congressional concern marked by legislation responsive to new problems." Although Congress has had sufficient opportunity to amend or repeal the anti-injunction proviso, it has not seen fit to do so.[19] Accordingly, any change in the meaning of the statute should be deferred to Congress. *See, e.g.*, Flood v. Kuhn, 407 U.S. 258 (1972); Toolson v. New York Yankees, 346 U.S. 356 (1953).

The anti-injunction proviso merely limits the availability of a particular type of state court remedy against a national bank. It does not prohibit permanent injunctions issued after a final hearing on the merits. Neither does it prevent an action for damages for the wrongful foreclosure or disposition of collateral or an action to set aside the transfer of property wrongfully sold at foreclosure. It merely prohibits interlocutory relief that could disrupt and interfere with the operations of national banks. If the statute produces hardship in particular instances, it is for the Congress to consider and respond.[20]

---

19. NOTE, *Congressional Reversal of Supreme Court Decisions: 1945-1947*, 71 HARV.L.REV. 1324 (1958).

20. *See, e.g.*, McClain v. Commissioner, 311 U.S. 527, 530 (1941) ("[W]e must apply the statute as we find it, leaving to Congress the correction of asserted inconsistencies and inequalities in its operation.")

CONCLUSION

The decision of the Tennessee Supreme Court cannot be squared with the plain meaning of the statute or with its legislative history or with the three leading decisions of this Court, which leave no room for argument or doubt. Nor can the Tennessee Court's holding be squared with the overwhelming weight of authority in this country.[21]

Admittedly, the Court is called upon to apply a federal statute which creates a favorable judicial immunity for national banks. The response of the Tennessee Court was to fashion an unwarranted amendment to Section 91.

The Tennessee decision constitutes an impermissible infringement on the historic, federally created right of national banks to be free from prejudgment injunctive process. If not reversed, the decision of the Supreme Court of Tennessee creates an exception that is so broad and so substantial that it vitiates the statute, overrules *Mixter* and *Van Reed*, and invites further unwarranted interference by state courts in this area.

---

21. Indeed, so intent on reaching its desired result was the Tennessee Court that it failed to cite the only reported case in which the Tennessee Appellate Courts had previously considered (and followed) the *Mixter* decision. *Rosenheim Real-Estate Co.* v. *Southern National Bank*, 46 S.W. 1026 (Tenn.Ch.App. 1897) involved a suit against a national bank for conversion of bonds plaintiff had placed with the bank for safekeeping. The trial court issued a prejudgment attachment against certain funds due the bank and enjoined certain bank debtors from paying the bank. Following *Mixter*, the appellate court reversed, holding that no prejudgment attachment or preliminary injunction would lie against a national bank. The report states that the decision was "Affirmed orally by Supreme Court, July 18, 1898."

Accordingly, the decision of the Supreme Court of Tennessee should be reversed and the temporary injunction dissolved.

Respectfully submitted,

THOMAS P. KANADAY, JR.
FARRIS, EVANS & WARFIELD
18th Floor, Third National Bank Building
Nashville, Tennessee 37219
Counsel for Petitioner

Of Counsel:
STEPHEN W. RAMP
FARRIS, EVANS & WARFIELD

Supreme Court, U. S.
FILED
MAR 22 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-674

THIRD NATIONAL BANK IN NASHVILLE, *Petitioner,*

vs.

IMPAC LIMITED, INC., F. MURRAY PARKER and JAMES K. WALL, *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

BRIEF FOR THE RESPONDENTS

GAIL P. PIGG
8th Floor
Home Federal Tower
230 Fourth Avenue, North
Nashville, Tennessee 37219
Counsel for Respondents

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

INDEX

STATUTES INVOLVED 1

QUESTION PRESENTED 3

STATEMENT 3

SUMMARY OF ARGUMENT 6

ARGUMENT 9

I. A FINANCIAL INSTITUTION, NATIONAL BANK OR OTHERWISE, IS NOT ABOVE THE LAW AND CANNOT FORECLOSE PROPERTIES AT ITS WHIM, WITH NO FEAR OF COURT INJUNCTIVE INTERFERENCE 9

A. National Banks Invite and Solicit Home Loans, Construction Loans and Other Collateralized Loans, for the Purpose of Making a Profit 10

1. The national bank dictates the terms of the note and requires that the borrower collateralize the loan with real estate, by means of a deed of trust 10

2. Bank has no ownership of property under a deed of trust in Tennessee—It is held as security by a trustee and only he can divest the borrower of title 11

B. Petitioner Argues That a National Bank Exclusively Makes the Sole, Self-Serving Determination of Default, Even If Erroneous or Fraudulent, So As to Trigger Foreclosure, With No Interference or Fear of Interference by the Courts, Even If the Borrower Is Irreparably Damaged 13

C. Petitioner Argues That National Banks Are in a Position Unique From Any Other Mortgage Lender or Any Other Entity Because of 12 U.S.C. §91 14

II. THE PURPOSE OF 12 U.S.C. §91 IS TO SECURE EQUALITY OF DISTRIBUTION OF ASSETS OF AN INSOLVENT BANK AMONG ITS CREDITORS, AND NOT TO SERVE AS A LICENSE FOR A NATIONAL BANK TO WRONGFULLY SEIZE ASSETS OF ITS DEBTORS 15

A. United States Supreme Court Decisions Have Not Extended 12 U.S.C. §91 to Mean That Individual Citizens Cannot Invoke Injunctive Relief to Protect Their Own Property Against Wrongful Foreclosure by a National Bank 17

1. The *Mixter* Decision 18

2. The *Earle* Decision 19

3. The *Van Reed* Decision 21

B. The Tennessee Supreme Court Decision Was Eminently Correct in Its Interpretation of the Statute and Application of United States Supreme Court Decisions 21

III. THE THEORY ADVANCED BY PETITIONER AS TO THE MEANING OF 12 U.S.C. §91 WOULD EFFECTIVELY DEPRIVE A MORTGAGOR OF HIS FUNDAMENTAL RIGHT OF DUE PROCESS OF LAW 24

CONCLUSION 27

Citations

CONSTITUTION

United States Constitution, Fifth Amendment 1, 2, 8, 24, 25, 27

TABLE OF CASES

Armstrong v. *Manzo*, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 24-25

Bachman v. *First Mechanics Nat. Bank of Trenton*, 69 F. Supp. 739 (D.C. N.J. 1947) 15

Carter v. *Taylor*, 40 Tenn. 30, 3 Head. 30 (1859) 12

Drewes and Co. v. *Ham and Seymour*, 103 S. 241 (La. 1925) 22

Earle v. *Pennsylvania*, 178 U.S. 449 (1900) 7, 19, 20

First National Bank v. *Colby*, 21 Wall. 609, 22 L.Ed. 687 (1874) 16

Fuentes v. *Shevin*, 92 S.Ct. 1983 (1972), 407 U.S. 67, 32 L.Ed.2d 556 .....9, 24, 25, 26

Harris v. *Buchignani*, 285 S.W.2d 108 (Tenn. S.Ct. 1955) 6, 11, 19

Joint Anti-Fascist Refugee Committee v. *McGrath*, 341 U.S. 123, 170-172, 71 S.Ct. 624, 647, 95 L.Ed. 817 (Frankfurter, J., concurring) 26

Jones v. *Thomas*, 296 S.W.2d 646 (Tenn. 1955) 14

Kwong Hai Chew v. *Colding*, N.Y. 1953, 73 S.Ct. 472, 344 U.S. 590 26

Loew's Inc. v. *Superior Court*, 301 P.2d 64 (Cal. App. 1956) 16

Mechanics Universal Joint Co. et al. v. *Culhane*, 57 S.Ct. 81, 299 U.S. 51 (1936) 16, 17

Pacific National Bank of Boston v. *Mixter*, 124 U.S. 721, 8 S.Ct. 718, 31 L.Ed. 567 (1888) 7, 15, 18, 21

Polston v. *Scandiyn*, 108 S.W.2d 1104, 21 Tenn. App. 252 (1937) 6, 12, 19

Rooney v. *First Wisconsin National Bank*, 332 F. Supp. 108 (E.D. Wisc. 1971) 15

Shapiro v. *Thompson*, 89 S.Ct. 1322, 394 U.S. 618, 22 L.Ed.2d 600 27

Sims v. *Rives*, 1936, 84 F.2d 871, 66 App. D.C. 24, cert. denied 56 S.Ct. 960 27
Stanley v. *Illinois*, 405 U.S. 645, 647, 92 S.Ct. 1208, 1210, 31 L.Ed.2d 551 (1972) 27
State ex rel. Southern Alaska Canning Co. v. *Superior Court for King County et al.*, 128 Wash. 100, 222 P. 203 (1924) 23
U. S. v. *Pipefitters Local Union No. 562*, 402 U.S. 994, 29 L.Ed.2d 160 27
Uhl v. *First National Bank and Trust Co. of Kalamazoo*, 24 F. Supp. 275 (Mich. 1935) 16
Van Reed v. *People's National Bank*, 25 S.Ct. 775, 198 U.S. 554 (1905) 7, 21
Walker v. *Wood*, 213 S.W.2d 523 (Tenn. Ct. of App., cert. denied, June, 1948) 11, 19

STATUTES CITED

62 Revised Statutes §5242 17,19
12 U.S.C. §91 (1970) 1, 2, 3, 5, 6, 7, 8, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24, 27, 28
12 U.S.C. §1931 17
50 U.S.C.A. App. §510 15
T.C.A. 23-2401—23-2404 ..... 2, 23
T.C.A. §35-501 12
T.C.A. §64-2501 12

OTHER AUTHORITIES

12 C.J.S., Statutes, §322, p. 577 16
43 C.J.S., Injunctions, §24, p. 448 14
59 C.J.S., Mortgages, §196 11
59 C.J.S., Mortgages, §494, p. 776 12

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-674

THIRD NATIONAL BANK IN NASHVILLE, *Petitioner*,

vs.

IMPAC LIMITED, INC., F. MURRAY PARKER and JAMES K. WALL, *Respondents*.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

BRIEF FOR THE RESPONDENTS

STATUTES INVOLVED

Petitioner cites 12 U.S.C. §91 (1970) as the statute involved, being that statute headed "Transfers by banks and other acts in contemplation of insolvency."

The issue advanced in this cause also involves the Fifth Amendment of the United States Constitution, which guarantees that no citizen will be deprived of his property without due process of law.

In addition to Section 91 of the National Bank Act and the Fifth Amendment of the United States Constitution, this case involves the Tennessee statute, "Sale Under Trust Deeds and Mortgages", *Tennessee Code Annotated* 23-2401—23-2404, which provides in pertinent part:

> *T.C.A.* 23-2401 (1873, mod. 1950). Notice of Application to enjoin sale.
>
> No judge or chancellor shall grant an injunction to stay the sale of real estate conveyed by deed of trust or mortgage, with a power of sale, executed to secure the payment of a loan of money, unless complainant gives five (5) days' notice to the trustee or mortgagee of the time when, place where, and of the judge or chancellor before whom said application for injunction is to be made. . ."
>
> *T.C.A.* 23-2403 (1873, mod. 1932) . . . After the reading of the bill in the hearing of the trustee or mortgagee, if he chooses to appear before the judge or chancellor, the said trustee or mortgagee may have the right to a delay of proceedings not more than ten (10) days, during which time he may file his answer before the same judge or chancellor.
>
> *T.C.A.* 23-2404 (1873, mod. 1932) Decree—The judge or chancellor may then, upon such bill and answer, hear said cause, at chambers, as upon motion to dissolve the injunction, his decision to be in a written decree, which decree, together with the bill, answer and exhibits, shall be enclosed in a sealed envelope, to the clerk of the court in which the bill is filed, said decree to constitute a part of the record in the cause, in conformity, to the terms of which, said clerk may take bonds from either party, or execute any other order as adjudged in said decree.

QUESTION PRESENTED

Whether a section of the National Bank Act, 12 U.S.C. §91 (1970) prohibits a state court from issuing an injunction against a national bank prior to a final judgment, temporarily restraining it from foreclosing upon the assets of a debtor in which the bank has a security interest.

STATEMENT

The question before this Honorable Court involves an interlocutory appeal only. Thus, the facts going to the merits are, for the most part, irrelevant. The pertinent facts are as follows:

1. Petitioner is a national banking association with its principal place of business, along with numerour branches, located in Nashville, Davidson County, Tennessee.

2. In May, 1973, Petitioner made a "permanent-construction" loan to Respondents evidenced by a $700,000.00 note, which is secured by a deed of trust encumbering the property, an office building. (A permanent-construction loan is one which, at time of completion of the improvements, is simply converted into a permanent loan with monthly payments.) (App. pp. 42-44, Exs. A, B). The named beneficiaries of the title insurance policy were both the permanent and construction lender. (App., p. 13).

3. On or about the same date, Petitioner, the Respondents and First and Mid-South Mortgage Company entered into a tri-party agreement whereby First and Mid-South agreed to purchase the note

and security instrument from Petitioner at completion of the construction. (App., pp. 15-21). The tri-party agreement prohibited Respondents from seeking permanent financing elsewhere. (App., pp. 19, 20).

4. At the time scheduled for closing in the summer of 1975, First and Mid-South refused to purchase the note from Petitioner as it had agreed, and, as its excuse, stated that certain conditions had not been met.

5. Petitioner did not pursue its remedy against First and Mid-South for breach of the tri-party agreement, but declared the note in default and proceeded to foreclose the property under its deed of trust. The principal balance due was $700,000.00, and the property was now valued in excess of $1,000,000.00.

6. On September 26, 1975, Respondents filed a complaint in the Chancery court of Davidson County, Tennessee, alleging that they were not in default on the loan and seeking to temporarily enjoin Petitioner from foreclosure pending a full hearing on the merits. (App., p. 2). The complaint and attached exhibits set forth the grounds upon which the injunction was sought. (App., pp. 2-31). The Chancellor did not grant an *ex parte* hearing as stated in Petitioner's brief, but struck that portion of the anticipatory order which Petitioner had prepared ordering a temporary restraint, and set the matter for a show cause hearing. (See App., p. 31). In doing so, the Chancellor followed the procedure required under Tennessee law. (See Statutes, *supra*).

7. At the show cause hearing October 8, 1975, the Chancellor found, upon the pleading, exhibits filed by Respondents, and extensive arguments of counsel, that Respondents had shown the existence of issues which should be determined upon a full hearing on the merits, and that Respondents would suffer irreparable harm if the foreclosure occurred prior to such full hearing. (App., pp. 56, 57).

8. A few days thereafter, Petitioner moved the Court to dissolve the injunction charging that under 12 U.S.C. §91, the court did not have jurisdiction to grant a temporary injunction prohibiting the foreclosure of property in which the bank has a security interest. The Chancellor found in favor of the Petitioner's position and entered an order on January 8, 1976, dissolving the injunction, but granting Respondents leave to perfect an interlocutory appeal to the Supreme Court of Tennessee. (App., pp. 68, 69).

9. The Supreme Court of Tennessee held that Section 91 of the National Banking Act does not bar a state court from issuing a temporary injunction restraining a national bank from foreclosing collateral and reversed the Chancellor's order. One of the justices did not participate in the majority opinion and one dissented. The Supreme Court of Tennessee, in its opinion, also found that "the United States District Courts in this State would have no jurisdiction to entertain this action . . . and that our State courts provide the only forum in which appellant may obtain relief." (App., pp. 70, 76).

10. This Court granted the petition for a writ of certiorari on January 10, 1977. 97 S.Ct. 731 (1977).

SUMMARY OF ARGUMENT

The theory of Petitioner attempts to interfere with the rights of courts, both federal and state, to protect citizens from wrongful foreclosure. Petitioner would thus deprive citizens of their fundamental right of due process before they can be deprived of their property.

Petitioner argues, under the authority of a section of the National Bank Act, 12 U.S.C. §91, that a national bank can foreclose properties of its debtors, and that the courts of our land cannot interfere to stop that sale by injunctive relief under any circumstances whatsoever.

National banks invite and solicit home loans and other loans by public advertisement, control the amount of the loan, the terms, the cost to the customer and everything else concerning those loans. In virtually every instance where a long term mortgage, construction loan and many other types of loans are involved, the bank requires the borrower to execute a deed of trust to his home or other piece of property to secure that loan.

Under the deed of trust in Tennessee, title to the property vests in the *trustee,* for the purpose of executing the trust, and a lien is thereby created against the property. *Harris* v. *Buchignani,* 285 S.W. 2d 108 (Tenn. S.Ct. 1955). The mortgagee is considered as a creditor, not an owner, and his only interest in the land is to secure payment of the debt. *Polston* v. *Scandlyn,* 108 S.W. 2d 1104, 21 Tenn. App. 252. A Trustee has the right to foreclose only in the event of a default in the terms of the security agreement.

Petitioner's theory, however, places the bank, through its officers, in the singularly favorable and unique position of replacing the courts in the event of controversy over default, and making an ex parte, self-serving determination of whether the debtor is, in fact, in default on the loan. Petitioner's theory is that regardless of how erroneous the decision of those bank officers might be, or the facts with which they are presented, even if wilfully fraudulent, with intent to deprive the debtor of his property, the courts cannot intervene and give the oppressed party injunctive relief pending a final hearing.

II.

The bank argues that its unique position of power over the assets of American citizens was given to it by a Congressional Act—12 U.S.C. §91 (1970), and the United States Supreme Court in cases construing that statute.

However, the statute itself is free from ambiguity. By its own heading, it regulates "Transfers by Banks and Other Acts in Contemplation of Insolvency." On its face, its purpose is to protect assets of an insolvent bank or bank contemplating insolvency from preferential treatment by one creditor over another. On its face, it prevents courts from issuing injunctions under such circumstances against a bank, or its property before final judgment. This meaning given this statute upon a reading of it would appear to be too clear for argument.

Petitioner argues, however, that the three United States Supreme Court cases of *Pacific National Bank of Boston* v. *Mixter,* 124 U.S. 721, 8 S.Ct. 718, 31 L.Ed. 567 (1888); *Earle* v. *Pennsylvania,* 178 U.S. 449 (1900); and *Van Reed* v. *People's National Bank,* 198 U.S. 554 (1905), extend 12 U.S.C. §91 to prohibit courts from temporarily enjoining foreclosure under any circumstances, for what-

ever reason, and regardless of whether the debtor would be irreparably damaged. Respondent submits that neither of those three cases is authority for reposing in national banks such broad and far-reaching power. While they did extend the statute to apply to dealings of national banks with creditors in cases where the banks are not yet insolvent or contemplating insolvency, they did not extend the statute beyond its intended purpose—to guard against preferential or wrongful disposition of the *assets* of a bank by its *creditors*. The United States Supreme Court in those cases *did not* hold that debtors of the banks could be deprived of their own assets without benefit of a court hearing.

The Tennessee Supreme Court, in holding that the national banks were not immune to injunctive powers of the Tennessee courts in wrongfully seizing or foreclosing a citizen's property, found that the banks could not seek to rely on State law so long as it was favorable to them, but not be bound by that part which accords relief to the citizens. (App., p. 76).

III.

Petitioner's argument that 12 U.S.C. §91 prohibits a State court from enjoining a national bank under any circumstances, if correct, would render the statute unconstitutional under the due process clause of the Fifth Amendment of the United States Constitution. Under Petitioner's theory, the bank determines default, without the debtor having an opportunity to be heard before an impartial tribunal—the bank is the tribunal. The bank, then, orders the trustee to foreclose, and the debtor is without a remedy to stop that sale. Also, the courts are without a remedy to prevent a citizen under their jurisdiction from being irreparably wronged. The sale is held,

and the property is gone. Under the deed of trust, a lender requires, as did the bank in this case (App., p. 43, Ex. B), that the debtor waive his equity of redemption. That waiver required by the bank was under the same deed of trust the bank now seeks to foreclose under its own determination of default.

The position the Petitioner takes in this cause is one which clearly deprives a citizen of due process of law. At the time of sale, his property is gone without a hearing. *Fuentes* v. *Shevin*, 92 S.Ct. 1983 (1972), 407 U.S. 67, 32 L.Ed. 2d 556. The fact that the injured party can still have a final hearing and possibly recover monetary damages, does not operate to undo the fact that the arbitrary taking that was subject to due process has already occurred. *Fuentes, supra*, at p. 1994. The United States Supreme Court has not embraced the general proposition "that a wrong may be done if it can be undone." *Fuentes, supra*, at p. 1994.

ARGUMENT

I.

A FINANCIAL INSTITUTION, NATIONAL BANK OR OTHERWISE, IS NOT ABOVE THE LAW AND CANNOT FORECLOSE PROPERTIES AT ITS WHIM, WITH NO FEAR OF COURT INJUNCTIVE INTERFERENCE.

Petitioner argues that any mortgagor who mortgages his real estate with a financial institution cannot avail himself of court protection by means of injunction if that bank wrongfully attempts to foreclose, provided, of course, the bank is a *national bank* rather than any other kind of financial institution.

A. National Banks Invite and Solicit Home Loans, Construction Loans and Other Collateralized Loans, for the Purpose of Making a Profit.

National banks throughout the country, and in particular in Tennessee, have established mortgage divisions which, for a profit in the form of brokerage fees and interest charged to the borrower, have chosen to engage, on a wholesale basis, in lending money to citizens for the purchase of residences, apartments, shopping centers, office buildings, and, in general, improvements and businesses of all types. For a profit, the banks have chosen to engage, on a wholesale basis, in lending money for the construction of many of those same improvements.

The bank advertises its wares, i.e., that it has money available for home loans or construction loans, etc., at lower interest rates, or lower brokerage fees or closing costs, and the public responds. For example, an individual desiring to purchase a home makes application for a permanent loan, normally payable monthly for twenty-five (25) to thirty (30) years.

1. The national bank dictates the terms of the note and requires that the borrower collateralize the loan with real estate, by means of a deed of trust.

The borrower is totally at the mercy of the lender as to the terms of the loan, i.e., how much interest rate, brokerage, origination fee and other closing costs. In fact, the lender makes the determination as to how much money to lend, and for how long a period. However, the borrower is required to mortgage his real estate, whether it be home or other type improvement, in its entirety. The instrument used to effect that transfer in Tennessee and

many other states is a deed of trust. This, of course, is an instrument by which a *non-judicial* sale of the property can be held by the trustee named in the instrument.

2. Bank has no ownership of property under a deed of trust in Tennessee—It is held as security by a trustee and only he can divest the borrower of title.

Under the deed of trust, legal title to the property vests in the *Trustee*. *Harris* v. *Buchignani*, 285 S.W. 2d 108 (Tenn. S.Ct. 1955).

Writing for the Supreme Court of Tennessee, Justice Burnett clearly stated the Tennessee law regarding title and property under a deed of trust and foreclosure sale by a trustee:

> "In this State the mortgage on the property in question or trust deed as we denominate it vests the title to the land described in the trust deed in the trustee and when there is a default under the terms of this trust and this is foreclosed, the deed of the trustee to the purchaser under this foreclosure gets good title thereto and such a deed is a proper link in its chain of title." *Harris, supra,* at p. 111.

Such legal title vests in the trustee, however, only for the purpose of executing the trust. 59 C.J.S., Mortgages, §196.

Under Tennessee law, all mortgages and trust deed, however drawn, are deemed in equity as mere securities, and such conveyances constitute mere liens. *Walker* v. *Wood*, 213 S.W. 2d 523 (Tenn. Ct. of App., cert. denied, June, 1948). The mortgagee is considered as a creditor, not an owner, and the only interest he has in the land,

consists in a lien or security for the payment of his debt. *Polston* v. *Scandlyn,* 108 S.W. 2d 1104, 21 Tenn. App. 252.

The Trustee is authorized under that trust instrument to hold foreclosure sale *only if* the borrower defaults in the terms of the trust instrument or the note securing the trust instrument. 59 C.J.S., Mortgages, §494, p. 776.

If there is no default in the terms of the mortgage, there can obviously be no foreclosure by the Trustee. 59 C.J.S., Mortgages, §494, *supra.*

At the foreclosure sale, a third party will bid in the property, or, if not, the bank will bid it in. *Only then* does the trustee convey to the bank and *only then* does it obtain legal title. No notice is required to foreclose other than the usual twenty (20) days' advertisement in a newspaper for three (3) consecutive weeks (as in the case at hand), which in Davidson County, Tennessee, is exclusively a legal publication. (See App., p. 43, Ex. B) *T.C.A.* §35-501.

Virtually all foreclosure sales are held free of the quity of redemption as deeds of trust in Tennessee contain a clause whereby the mortgagor waives his right to equity of redemption. (App. 44, Ex. B).

Once the indebtedness is fully paid, title revests in the borrower, and the holder of the note is required by Tennessee law to release the lien of the deed of trust on the courthouse records. *T.C.A.* §64-2501. After payment, the deed of trust can never be set up against the borrower, either in law or in equity. *Carter* v. *Taylor,* 40 Tenn. 30, 3 Head. 30.

B. Petitioner Argues That a National Bank Exclusively Makes the Sole, Self-Serving Determination of Default, Even If Erroneous or Fraudulent, So As to Trigger Foreclosure, With No Interference or Fear of Interference by the Courts, Even If the Borrower Is Irreparably Damaged.

Many controversies have arisen and will continue to arise, between a lender and a borrower, as to whether a loan is in default, and whether foreclosure of the property is justified. Yet, the position of the Petitioner is that if the lender is fortunate enough to be a national bank, rather than a Federal Savings and Loan Association, or any other financial institution, then the bank shall make the sole determination as to whether the note is in default. If, for example, payments have been made by a borrower and credited by the bank to the wrong account, and the bank proceeds to foreclose by giving twenty (20) days' notice in small print in a legal newspaper, the borrower, even if he is fortunate enough to run across that advertisement, is completely helpless to stop foreclosure. Petitioner argues that not only is the borrower helpless, the courts are also helpless, as the banks have chosen to foreclose, and must sit back and watch that homeowner's lifetime investment be sold. Petitioner argues that even if foreclosure is had by a scheming, unscrupulous and cunning banker, even to the extent of fraud against the property owner, the courts are still unable to stop that sale. Petitioner asserts, however, that the property owner is not hurt, as he can ultimately recover damages for the loss of that homeplace, or that farm, or that office building, or that business. Petitioner assumes first that money will replace every loss—that irreparable injury never exists. Petitioner assumes further that true damages are always admissible, never inadequate, and can always be proved.

Petitioner further assumes that all injured parties can afford to pay the large legal fees and costs necessary to seek final legal redress. Respondent submits that a large percentage cannot.

Acts which destroy or result in a serious change of property, either physically or in the character in which it has been held or enjoyed, have been held to do an irreparable injury. 43 C.J.S., Injunctions, §24, p. 448.

In the case of *Jones* v. *Thomas*, 296 S.W. 2d 646 (Tenn. 1955), the court found that the mortgagee had purchased property at a foreclosure sale in fraud of the mortgagor. However, the property had been sold to a third party. Therefore, the only damages recoverable by the defrauded party were the value of the mortgagor's equity in her home at date of sale. Obviously this type of monetary remuneration can never adequately pay for the replacement of a valued piece of property, or business of the mortgagor.

C. Petitioner Argues That National Banks Are in a Position Unique From Any Other Mortgage Lender or Any Other Entity Because of 12 U.S.C. §91.

Petitioner's argument clearly places a national bank in a unique position, one not enjoyed by any other institution or entity. For example, assume that two homeowner-borrowers sought injunctions against two different lenders for wrongful foreclosure in the same court on the same date. One lender is a Federal Savings and Loan, the other, a national bank. The court finds irreparable damages in both cases, and grants the injunction in the first case, but does not in the second case because the lender is a national bank. One homeowner loses his homeplace, the other does not. Such a situation is absurd and most

assuredly deprives both the homeowner and the Savings and Loan Association of equal protection under the law, hereinafter more fully discussed.

Take further the soldier who invokes protection against mortgage payments and foreclosure under the Soldiers and Sailors Relief Act, Civil Relief Act of 1940, 50 U.S.C.A. App. §§510 et seq. Is a national bank immune from injunction if it ignores the Soldiers and Sailors Relief Act and proceeds to foreclose? Likewise, assume an individual contemplating bankruptcy mortgages his property with a national bank within four (4) months of filing petition in bankruptcy, and assume that it is deliberately to defraud creditors. He defaults on his payments, and the bank proceeds to foreclose. Is the bankruptcy court prohibited from enjoining the bank under any circumstances? Petitioner's answer to both these questions would be in the affirmative, as the cases are clear that the injunctive relief prohibited by 12 U.S.C. §91 is applicable against Federal Courts as well as state courts. *Pacific National Bank of Boston* v. *Mixter*, 124 U.S. 721, 8 S.Ct. 718, 31 L.Ed. 567 (1888); *Bachman* v. *First Mechanics Nat. Bank of Trenton*, 69 F. Supp. 739 (D.C. N.J. 1947); *Rooney* v. *First Wisconsin National Bank*, 332 F. Supp. 108 (1971).

II.

THE PURPOSE OF 12 U.S.C. §91 IS TO SECURE EQUALITY OF DISTRIBUTION OF ASSETS OF AN INSOLVENT BANK AMONG ITS CREDITORS, AND NOT TO SERVE AS A LICENSE FOR A NATIONAL BANK TO WRONGFULLY SEIZE ASSETS OF ITS DEBTORS.

It is Petitioner's argument that the enviable, all-powerful and unique position of a national bank previously dis-

cussed comes about as a result of a Congressional Act, in particular 12 U.S.C. §91 (1970) of the National Bank Act. This is a statute which clearly, by its own terms, provides regulation in regard to transfers by banks and other acts *in contemplation of insolvency.* There is no way that meaning can be misinterpreted. It is *plain, on its face, and free from ambiguity,* to any reader. Where the language of a statute is plain and unambiguous there is no occasion for construction, and the statute must be given effect according to its plain and obvious meaning. 12 C.J.S., Statutes, §322, p. 557. To interpret this statute to mean that it enjoins a bank from foreclosure under any *circumstances* whatsoever is to add to the meaning beyond all bounds of reason. Congress would not and did not intend to give the banks a license to run roughshod over citizens so that even the judicial system is helpless to intervene. Petitioner argues that, under 12 U.S.C. §91, the judicial system must sit idly and helplessly by in the face of *whatever action* a national bank chooses to take against a citizen, whether foreclosure of his property or any other act, and wait until that citizen can get a *final* hearing in court. By then, of course, the action is taken, his property is gone, and it is, quite simply, too late.

The purpose of that statute was clearly to guard against wrongful or preferential disposition of assets of banks known to be or about to become insolvent, and to secure equality of distribution of the assets of an insolvent bank among its creditors. *Uhl* v. *First National Bank and Trust Co. of Kalamazoo,* 24 F. Supp. 275 (Mich. 1935); *First National Bank* v. *Colby,* 21 Wall. 609, 22 L.Ed. 687 (1874); *Loew's Inc.* v. *Superior Court,* 301 P.2d 64 (Cal. App. 1956); *Mechanics Universal Joint Co. et al.* v. *Culhane,* 57 S.Ct. 81, 299 U.S. 51 (1936). In the *Culhane* case, in 1936, Justice Brandeis interpreted 12 U.S.C. §1931 as follows:

> "One of the objects of the national bank system is to secure, in the event of insolvency, a just and equal distribution of the assets of national banks among unsecured creditors, and to prevent such banks from creating preferences in contemplation of their failure . . . To that end R.S. §5242, 12 U.S.C. §91 (12 U.S. C.A. §91), prohibits preferential payments."

The purpose of 12 U.S.C. §91 was obviously clear in the mind of Justice Brandeis—a just and equal distribution of the assets of a national bank among *creditors*—not a license to injure, by fraud or by simple error, its *debtors* by taking away their property without court interference.

A. United States Supreme Court Decisions Have Not Extended 12 U.S.C. §91 to Mean That Individual Citizens Cannot Invoke Injunctive Relief to Protect Their Own Property Against Wrongful Foreclosure by a National Bank.

It is an uncontroverted fact that Petitioner is neither insolvent nor remotely contemplating insolvency. However, Petitioner argues that three United States Supreme Court decisions effectively extended that statute, and removed altogether the remedy of injunction against a national bank under any circumstances whatsoever, regardless of degree of culpability, regardless of degree of damage to the borrower and regardless of whether the bank was insolvent or contemplated insolvency. Respondent respectfully submits that such was not the holding of those cases; nor was it the intention of the court in either of those cases to give to national banks a license to make judicial

and self-serving decisions in dealing with its debtors in literally any case.

1. The Mixter Decision.

The first case is *Pacific National Bank of Boston* v. *Mixter*, 124 U.S. 721, 8 S.Ct. 718, 31 L.Ed. 567 (1888). This case dealt exclusively with an attachment against bank funds. The bank owed Mixter Fifteen Thousand Dollars. Mixter began a suit by attachment to try to recover the monies due him. There were, at the same time, other creditors of the bank who were attempting to attach. While the bank was not *insolvent*, it was having difficulties with creditors, and the bank would clearly be injured if an attachment issued prior to final judgment. Thus, we are brought to the finding of the court that the bank did not have to be actually insolvent or contemplating insolvency for Section 91 to apply, and the language that "The remedy is taken away altogether and cannot be used under any circumstances." *Mixter, supra*, p. 727. This case, however, dealt with the bank's *creditors*, not its *debtors*, as is true in the case at hand.

While the *Mixter* case did interpret the statute to apply to dealings with creditors in cases where the banks are not yet insolvent or contemplating insolvency, it *did not* extend the case beyond its intent—to guard against preferential or wrongful disposition of the assets of banks by their *creditors*.

Petitioner interprets certain dicta of the court in the *Mixter* case to mean that the court held that under no circumstances whatsoever can a state court or federal court enjoin a national bank. The court did not have before it the question of a bank's dealings on an ordinary day-to-day basis with its debtors and the attempt by those

debtors to preserve their own assets from being wrongfully sold pending a final hearing. To the contrary, the court was concerned with preserving the assets of the bank pending a final hearing.

Respondent would point out that the property conveyed under a deed of trust is simply held under a trust agreement until such time as there is a determination that the borrower is in default on his loan. Pending that period, the property is *not* an asset of the bank—it is simply collateral held under a trust agreement and subject to the terms of that trust. *Harris* v. *Buchignani, supra*; *Walker* v. *Wood, supra*; *Polston* v. *Scandlyn, supra*.

2. The Earle Decision.

The second of the Supreme Court cases cited by Petitioner is the case of *Earle* v. *Pennsylvania*, 178 U.S. 449 (1900). In that case the Defendant obtained judgment against one James Long for Thirty-One Thousand Four Hundred Ninety-Nine and No/100 ($31,499.00) Dollars. A writ of attachment was issued against Chestnut Street National Bank as garnishee on October 28, 1897. December 15, 1897, a rule was entered for judgment against the bank as garnishee. On December 23, 1897, the bank suspended payment of its obligations and, by order of the United States Comptroller, closed its doors to business. On January 29, 1898, Earle was appointed receiver, who then attacked the previous attachment as null and void for want of jurisdiction under §5242, Revised Statute of the U.S. (12 U.S.C. §91). The court found that an attachment sued out against the bank as garnishee is not an attachment against the bank *or its property* within the meaning of that section. Justice Harlan writing for the court, stated clearly that §5242 is to be construed in connection with transfers, etc. of a bank made in contemplation

of an act of insolvency. On page 917 of that opinion is the following language:

> "Sections 5234, 5235, and 5236, above quoted, have reference to the affairs and property of national banks in the hands of receivers, and the administration of its assets by the Comptroller; and the words in §5242, 'no attachment, injunction, or execution shall be issued against such association or its property before final judgment in any suit, action, or proceeding in any state, county, or municipal court,' are to be construed in connection with the previous parts of the same section declaring null and void certain transfers, assignments, deposits, and payments made after the commission by the bank 'of an act of insolvency, or in contemplation thereof,' with the intent to prevent the application of the bank's assets in the manner prescribed by Congress, or with a view of the preference by the bank of one creditor to another. Whatever may be the scope of §5242, an attachment sued out against the bank as garnishee is not an attachment against the bank or its property, nor a suit against it, within the meaning of that section. It is an attachment to reach the property or interests held by the bank for others." 178 U.S. at 453, 454.

Although repetitious, it should be noted here, again, that a borrower's property, held under a deed of trust, is *not* an asset of the bank, as hereinabove more fully set forth. Legal title vests in the trustee of that instrument, and the bank has only a security interest.

Although Petitioner propounds the theory that an injunction or attachment can never issue against a bank under *any circumstances,* the *Earle* case clearly contradicts that theory.

3. The Van Reed Decision.

The last of the three Supreme Court cases relied on by Petitioner is the case of *Van Reed* v. *People's National Bank,* 198 U.S. 554 (1905). In this case, the Plaintiff was a creditor of the bank and commenced an action by levying an attachment of the bank's funds. The court followed the *Mixter* holding that attachments against a national bank were prohibited by 12 U.S.C. §91, whether the banks were solvent or insolvent. That case is distinctly different from the case at hand, as the court was concerned in *Van Reed* with protecting the bank's assets from attachment. Here, there is a converse situation—the court is concerned with protecting the assets of the bank's debtors—the mortgagor-property owner—against improper and unlawful foreclosure by the bank itself.

Respondent respectfully submits that neither of the Supreme Court decisions above cited gives a bank's officers, under the guise that they are protected by the National Bank Act, a license to wrongfully foreclose a citizen's property at their will, or misuse or mistreat a citizen in any other way, and be totally free of injunctive interference by state courts. Neither of the cases extends 12 U.S.C. §91 to mean that a state court cannot interfere by means of injunctive relief when a bank's debtors seek to protect *their own property* from missuse by the bank.

B. The Tennessee Supreme Court Decision Was Eminently Correct in Its Interpretation of the Statute and Application of United States Supreme Court Decisions.

Respondent respectfully takes exception to the statement in Petitioner's brief that the Tennessee Supreme Court ignored "the thrust" of the hereinabove cited United

States Supreme Court decisions, and the implication that the Tennessee Court failed to make a thorough study of the question involved.

The Tennessee Supreme Court recognized in its opinion, as does Respondent, that the lower court case law throughout the country is confused and in conflict on the issue presented before this Honorable Court. (App. 73). The Tennessee Supreme Court, in its decision, looked to the purpose of 12 U.S.C. §91—to secure the *assets* of a national bank for ratable distribution among creditors. The Tennessee Justices determined after careful and extensive research, that this Honorable Court had not extended the *Mixter* rationale to a situation in which a debtor of a national bank sought to protect *his own* property from wrongful seizure and foreclosure. (App. 73).

A quite thorough study and examination of many lower court cases involving the question before this court is found in *Drewes and Co.* v. *Ham and Seymour*, 103 S. 241 (La. 1925). In an in-depth study of Section 91 and numerous cases applying thereto, the court found those cases applying Section 91 to be cases in which the suit and main demand was against the bank as the debtor or obligee (*Drewes*, p. 244). The court found that the injunction in that case was proper. The Tennessee Supreme Court recognized also the obvious and clear distinction between protecting property assets of a bank in order to prevent preferential treatment of creditors and the right of a *debtor* to protection against wrongful seizure of his property. (App. 73).

When Petitioner chose to engage on a large scale basis in mortgage financing of homes and other improvements, it brought into play Tennessee law relating to deeds of trust. Guidelines for public foreclosure sales under deeds

and the injunctions of such sales are established under *Tennessee Code Annotated* 23-2401—23-2404, "Sale Under Trust Deeds and Mortgages." Petitioner seeks to rely on this law to its advantage, and induce the unsuspecting citizen and customer into executing a deed of trust securing his property, but on the other hand, Petitioner says that same unsuspecting citizen cannot stop a wrongful foreclosure by the bank under that same deed of trust. Petitioner asserts the bank can do as it pleases with that customer's property, and the court cannot stop it. Respondent submits that placing the bank in such a frighteningly powerful position was neither the intention of Congress nor of the United States Supreme Court in any of the afore-cited cases.

The Tennessee Supreme Court recognized the dangers of a mortgage-banker being placed in such a position (App. 76), as did the court in *State ex rel. Southern Alaska Canning Co.* v. *Superior Court for King County et al.*, 128 Wash. 100, 222 P. 203 (1924). In that case the bank sought to foreclose a chattel mortgage and was proceeding with foreclosure when the mortgagor sought a temporary injunction, alleging a credit due him against the note securing the chattel mortgage. The bank asserted 12 U.S.C.A. §91 as a defense. The court stated in response:

> "That statute cannot have any weight here. Although the mortgagee was and is a national bank, it has undertaken in its foreclosure to take advantage of the statutes of this state, and it cannot take action under a part of that statute without being also bound by the other provisions of it." p. 205.

III.

THE THEORY ADVANCED BY PETITIONER AS TO THE MEANING OF 12 U.S.C. §91 WOULD EFFECTIVELY DEPRIVE A MORTGAGOR OF HIS FUNDAMENTAL RIGHT OF DUE PROCESS OF LAW.

Amendment 5 of the United States Constitution assures citizens that no person shall be deprived of his property without due process of law.

Respondent does not argue that the National Bank Act is *per se* unconstitutional, because Respondent submits that it does not stand for the proposition that a national bank is immune to injunction against unlawful foreclosure of its debtor's assets. Respondent does argue, however, that the construction placed on the statute by the Petitioner would render it unconstitutional.

To deprive a citizen of the right to protect his property against unreasonable, fraudulent or simply erroneous foreclosure, without benefit of the right to a court hearing before that property is taken, is surely to deprive that individual of his guaranteed right to due process of law. Under Petitioner's interpretation of 12 U.S.C. §91, the bank itself, through one of its officers, makes the sole determination of whether the debtor is in default and based on that determination alone, the debtor's property is foreclosed.

The meaning of due process is clearly that a party whose rights are to be affected is entitled to be heard; that he must be notified of the hearing and that the right to notice and an opportunity to be heard must be granted at a meaningful time and a meaningful manner. *Fuentes* v. *Shevin*, 92 S.Ct. 1983 (1972), 407 U.S. 67, 32 L.Ed.2d 556; *Armstrong* v. *Manzo*, 380 U.S. 545, 85 S.Ct. 1187,

14 L.Ed.2d 62. The hearing required must be a fair one, that is, one before a tribunal which meets at least currently prevailing standards of impartiality. *Kwong Hai Chew* v. *Colding*, N.Y. 1953, 73 S.Ct. 472, 344 U.S. 590. There can, of course, be no impartiality where the trier of fact is the interested, adverse party, and the hearing, even then, is *ex parte*.

Petitioner would, of course, argue that due process is ultimately obtained at the final hearing, and the injured mortgagor can recover in damages. This argument is senseless, as (1) the property is gone and one can seldom, if ever, recover the sentimental, esthetic, or even true monetary value of loss of property, as previously noted, and (2) the Fifth Amendment clearly says *no person shall be deprived of property* without due process of law. It should be borne in mind, that under state law, when that property is sold at foreclosure sale, it is gone. The property owner is *at that point deprived of his property without a hearing* (and far too often even without notice), in direct contradiction of the Fifth Amendment. Due process is simply not met if the property is seized and sold and then one gets a hearing that comes too late.

This court, in the case of *Fuentes* v. *Shevin, supra*, dealt with the constitutionality of certain state replevin statutes which authorized the seizure of property before a final judgment. While we are dealing here with real property rather than personalty and with construction of a federal, rather than a state statute, the principles and issues involved are the same. The court, through Mr. Justice Stewart, held that the prejudgment replevin statute worked a deprivation of property without due process insofar as they denied the right to prior opportunity to be heard before chattels were taken from their possession.

No more effective arguments can be made for the right of a citizen to a notice and hearing before deprivation of his property than those propounded by Mr. Justice Stewart in the *Fuentes* case, *supra*, 92 S.Ct. at p. 1994:

> "The requirement of notice and an opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions. But the fair process of decision making that it guarantees works, by itself, to protect against arbitrary deprivation of property. For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented. It has long been recognized that 'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . [And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.' Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 170-172, 71 S.Ct. 624, 647, 95 L.Ed. 817 (Frankfurter, J., concurring).

If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. 'This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone.' Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 1210, 31 L.Ed.2d 551."

Respondents would also briefly state that an individual is denied equal protection under the law if he can lose his property without a hearing solely because his mortgage is with a national bank, while the next individual, whose mortgage is with a different financial institution, can seek and invoke injunctive relief. While the Fifth Amendment does not contain an equal protection clause such as is provided in the 14th Amendment, the concept of equal protection is, nevertheless, embraced within the due process clause and does forbid discrimination that is so unjustifiable as to be violative of due process. *U. S.* v. *Pipefitters Local Union No. 562*, 402 U.S. 994, 29 L.Ed.2d 160; *Shapiro* v. *Thompson*, 89 S.Ct. 1322, 394 U.S. 618, 22 L.Ed.2d 600; *Sims* v. *Rives*, 1936, 84 F.2d 871, 66 App. D.C. 24, cert. denied 56 S.Ct. 960.

CONCLUSION

Respondents respectfully submit for the reasons hereinabove set forth, that 12 U.S.C. §91 and the United States Supreme Court cases dealing with that statute, do not stand for the proposition that a national bank cannot be temporarily enjoined from wrongful foreclosure of a customer's assets, nor do they stand for the proposition that the officers of a bank replace the judicial system in settling controversies regarding a citizen's rights and his assets. Respondents submit that by virtue of the due process clause of the United States Constitution, that right is left exclusively to the courts of our land.

Respondents further submit that property owned by an individual, but conveyed to a trustee under a deed of trust to secure payment of an indebtedness is not the bank's property within the meaning of 12 U.S.C. §91.

Accordingly, Respondents pray that the decision of the Supreme Court of Tennessee should be affirmed.

Respectfully submitted,

GAIL P. PIGG
8th Floor
Home Federal Tower
230 Fourth Avenue, North
Nashville, Tennessee 37219
Counsel for Respondents

FOR ARGUMENT

Supreme Court, U. S.
FILED
APR 21 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-674

THIRD NATIONAL BANK IN NASHVILLE,
Petitioner,
vs.
IMPAC LIMITED, INC., et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

PETITIONER'S REPLY BRIEF

THOMAS P. KANADAY, JR.
FARRIS, EVANS & WARFIELD
18th Floor, Third National Bank Building
Nashville, Tennessee 37219
Counsel for Petitioner

Of Counsel:
STEPHEN W. RAMP
FARRIS, EVANS & WARFIELD

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

INDEX

INTRODUCTION 1

ARGUMENT 3

I. This is not an appropriate case for a review of the due process issue 3

A. Constitutional issues raised for the first time in this Court will not be considered 3

B. It is the sound policy of this Court to decide cases on grounds other than constitutional grounds whenever practicable 4

II. The Fifth and Fourteenth Amendments have no bearing on this case 4

III. 12 U.S.C. § 91 does not violate Respondents' constitutional guarantee of due process of law 12

A. A meaningful hearing is available 12

B. Respondents have waived any constitutional defenses 13

Table of Cases

Adams v. *Southern California First National Bank*, 492 F.2d 324 (9th Cir.), *cert. denied* 419 U.S. 1006 (1974) 11

Alma Motor Company v. *Timken-Detroit Axle Company*, 329 U.S. 129 (1946) 4

Barrera v. *Security Building & Investment Corporation*, 519 F.2d 1166 (5th Cir. 1975) 5, 11

Bell Silver & Copper Mining Co. v. *First National Bank*, 156 U.S. 470, 477, 15 S.Ct. 440, 443, 39 L.Ed. 497, 501 (1895) 8

Bichel Optical Laboratories, Inc. v. *Marquette National Bank of Minneapolis*, 487 F.2d 906 (8th Cir. 1973) 11
Black v. *Cutter Laboratories*, 351 U.S. 292, 76 S.Ct. 824, 100 L.Ed. 1188 (1955) 6
Bryant v. *Jefferson Federal Savings and Loan Ass'n*, 509 F.2d 511 (D.C. Cir. 1974) 9, 10
Cardinale v. *Louisiana*, 394 U.S. 437 (1969) 3
Curtis Publishing Co. v. *Butts*, 388 U.S. 130, 143 (1967) 13
Duignan v. *United States*, 274 U.S. 196 (1927) 3
Evans v. *Newton*, 382 U.S. 296 (1965) 9
Fuentes v. *Shevin*, 407 U.S. 67 (1972) 2, 5, 6, 13
Gibbs v. *Titelman*, 502 F.2d 1107 (3rd Cir. 1974) 6, 7, 11
Global Industries v. *Harris*, 376 F. Supp. 1379 (N.D. Ga. 1974) 10
Greene v. *First National Exchange Bank of Virginia*, 348 F. Supp. 672 (W.D. Va. 1972) 11
Held v. *Tennessee Title Company*, 223 Tenn. 545, 448 S.W.2d 413 (1969) 13
Hill v. *California*, 401 U.S. 797 (1971) 3
Hipp v. *Hutchett*, 4 Tex. 20 (1849) 7
James v. *Pinnix*, 495 F.2d 206 (5th Cir. 1974) 11
Kinch v. *Chrysler Credit Corp.*, 367 F.Supp. 436 (E.D. Tenn. 1973) 11
Lawson v. *Smith*, 402 F.Supp. 851 (N.D. Cal. 1975) 10
McCormick v. *First National Bank of Miami*, 322 F. Supp. 604 (S.D. Fla. 1971) 11
Mercantile National Bank v. *Langdeau*, 371 U.S. 555 (1963) 2
Moose Lodge No. 107 v. *Irvis*, 407 U.S. 163, 172, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972) 9-10
Nelson v. *County of Los Angeles*, 362 U.S. 1, 9 (1960) 3

Northrip v. *Federal National Mortgage Association*, 527 F.2d 23 (6th Cir. 1975), *rev'g* 372 F.Supp. 594 (E.D. Mich. 1974) 4, 11
Overmyer, D. H. Co. v. *Frick Co.*, 405 U.S. 174 (1972) 6
Pacific National Bank of Boston v. *Mixter*, 124 U.S. 721 (1888) 1
Pease v. *Havelock National Bank*, 351 F.Supp. 118 (D. Neb. 1972) 11
Radzanower v. *Touche, Ross & Co.*, 96 S.Ct. 1989 (1976) 2
Reitman v. *Mulkey*, 387 U.S. 369 (1967) 10
Scott v. *Paisley*, 271 U.S. 632 (1926) 8
Shelley v. *Kraemer*, 334 U.S. 1 (1948) 10
Shelton v. *General Electric Credit Corp.*, 359 F.Supp. 1079 (M.D. Ga. 1973) 11
Shirley v. *State National Bank of Connecticut*, 493 F.2d 739 (2nd Cir. 1974) 6, 11
Slee v. *President, et al. Manhattan Co.*, 1 Paige 48 (N.Y. 1828) 7
Sniadach v. *Family Finance Corporation of Bay View*, 395 U.S. 337 (1969) 2, 5, 6
Swarb v. *Lennox*, 405 U.S. 191 (1972) 6
Turner v. *Impala Motors*, 503 F.2d 607 (6th Cir. 1974) 11
Van Reed v. *People's National Bank*, 198 U.S. 554 (1905) 1-2
Wong Tai v. *United States*, 273 U.S. 77 (1927) 3
Woods v. *State of Tennessee*, 378 F.Supp. 1364 (W.D. Tenn. 1974) 11
Yakus v. *United States*, 321 U.S. 414 (1944) 14

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-674

THIRD NATIONAL BANK IN NASHVILLE,
Petitioner,

vs.

IMPAC LIMITED, INC., et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF TENNESSEE

PETITIONER'S REPLY BRIEF

INTRODUCTION

The question before the Court is whether Section 91 of the National Bank Act, as interpreted by this Court, deprives state courts of jurisdiction to issue a temporary injunction restraining a national bank from foreclosing on its collateral. The Chancellor followed this Court's holdings in *Pacific National Bank of Boston* v. *Mixter*, 124 U.S. 721 (1888) and *Van Reed* v. *People's National*

Bank, 198 U.S. 554 (1905) and the policies articulated by this Court in *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555 (1963) and *Radzanower* v. *Touche, Ross & Co.*, 96 S.Ct. 1989 (1976) and dissolved the temporary injunction he had earlier issued against Petitioner.

The Supreme Court of Tennessee reversed the Chancellor on the ground that the statute does not mean what it appears to mean, and reinstated the injunction.

At no stage in the proceedings prior to the filing of Respondents' brief on the merits in this Court has the question of due process been briefed, argued, or even considered. Nor were any constitutional issues raised by Respondents' Brief in Opposition to the Petition for a Writ of Certiorari. Now, however, Respondents argue that the Chancellor's interpretation of Section 91 of the Act would deprive them of property without affording them due process of law. Their argument is premised on the erroneous assumption that, since *Sniadach* v. *Family Finance Corporation of Bay View*, 395 U.S. 337 (1969), and *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), every debtor is entitled to a hearing before a creditor can exercise his rights against collateral.

Petitioner makes three responses to Respondents' eleventh hour constitutional attack on Section 91 and the Chancellor's interpretation of Section 91:

I. *This Is Not An Appropriate Case For A Review Of The Due Process Issue,*

II. *The Fifth and Fourteenth Amendments Have No Bearing On This Case,*

III. *12 U.S.C. § 91 Does Not Violate Respondents' Constitutional Guarantee Of Due Process Of Law.*

ARGUMENT

I. This is not an appropriate case for a review of the due process issue.

A. Constitutional issues raised for the first time in this Court will not be considered.

The Supreme Court has, on many occasions, declined to consider constitutional arguments raised for the first time on appeal. Hill v. California, 401 U.S. 797 (1971); Cardinale v. Louisiana, 394 U.S. 437 (1969); Nelson v. County of Los Angeles, 362 U.S. 1, 9 (1960); Wong Tai v. United States, 273 U.S. 77 (1927). In *Cardinale, supra,* Justice White explained: "The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions. . . . Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind." *Id.* at 438-39.

Similarly, in *Duignan* v. *United States*, 274 U.S. 196 (1927) Mr. Justice Stone refused to consider the constitutionality of the forfeiture of a leasehold under Section 23 of the National Prohibition Act because it was not raised in the trial court or in the assignment of errors.

In this case the record below is absolutely devoid of any consideration or analysis of the due process arguments now raised by Respondents. This Court should have the benefit of a complete record, considered briefs and the judgment of the courts below before it is called on to decide with finality questions of great import.

B. It is the sound policy of this Court to decide cases on grounds other than constitutional grounds whenever practicable.

It is well established that the Supreme Court seeks to avoid constitutional questions whenever a case can be decided on non-constitutional grounds. Alma Motor Company v. Timken-Detroit Axle Company, 329 U.S. 129 (1946).[1]

II. The Fifth and Fourteenth Amendments have no bearing on this case.

Petitioner submits that the posture of this case makes a consideration of Respondents' constitutional arguments unnecessary and ill-advised. However, if the Court chooses to address the constitutional issues, Petitioner argues that Respondents' invocation of the due process clause is spurious because there is no state or federal action in this case.

This case arises out of Petitioner's attempt to foreclose commercial property under a power of sale conferred by a deed of trust which secures Respondents' defaulted note. A number of lower federal courts have considered whether foreclosure under a power of sale is constitutionally sound. The cases addressing the issue overwhelmingly hold that foreclosure under a power of sale without a preforeclosure hearing does not violate the mortgagor's right to due process of law. In *Northrip* v. *Federal National Mortgage Association*, 527 F.2d 23 (6th Cir. 1975), *rev'g* 372 F.Supp. 594 (E.D. Mich. 1974), the mortgagors sued the mortgagee to set aside a foreclosure sale on the theory that the sale by the sheriff pursuant to a power of sale conferred

1. "This Court has said repeatedly that it ought not pass on the constitutionality of an act of Congress unless such adjudication is unavoidable." 329 U.S. at 136 (1946).

upon him in the mortgage, without a presale hearing, violated the mortgagors' right to due process under the Fifth and Fourteenth Amendments. The Court of Appeals for the Sixth Circuit, speaking through Judge McCree, found that the case "concerns a remedy privately created by contract" recognized at common law, and not governmental action against an individual. 527 F.2d at 28.[2]

> "The garnishment (in *Sniadach*) and replevin (in *Fuentes*) did not depend upon a contractual power granted to the creditor as is the case here. Instead, any person could invoke the aid of the state with no more than a bare assertion that money was owed him." 527 F.2d at 28.

In *Barrera* v. *Security Building & Investment Corporation*, 519 F.2d 1166 (5th Cir. 1975) individuals who had lost their house and lot in a non-judicial foreclosure under a power of sale contained in a deed of trust unsuccessfully sued for damages and for a declaratory judgment that the Texas statute governing foreclosures failed to meet minimum standards of due process under the Fourteenth Amendment. The Court of Appeals for the Fifth Circuit, speaking through Judge Wisdom, in a carefully reasoned opinion, found that there was not a sufficiently close nexus between the state and the challenged action to give rise to a Fourteenth Amendment claim:[3]

2. "The power is part of the contract, and should be construed on principles applicable to contracts, and not as a hostile process." 527 F.2d at 27. The Court also analyzed and rejected plaintiffs' assertion that federal action was present since the mortgagee, FNMA, was created by Congress in the National Housing Act of 1968, 12 U.S.C. § 1716 (1970).

3. "The state has not cast the weight of its approval behind the practice challenged here. It has merely stayed its hand. . . . No such nexus is evident here. The regulation cited by the appellants does not betray a state partnership in the challenged activity or the kind of symbiotic relationship that would permit us to impute to the state the responsibility for the challenged conduct." 519 F.2d at 1172.

"First, there is no direct involvement of the state in the act complained of here. No state official or agency participated in the creation of the power of sale, in the decision to exercise that power, or in the actual exercise of that power. At no time did the seller seek or rely on the aid of any arm or agent of the state. This absence of direct state involvement in the act by which the deprivation itself was accomplished sets this case apart from *Fuentes* v. *Shevin*, 1972, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556; *D. H. Overmyer Co.* v. *Frick Co.*, 1972, 405 U.S. 174, 92 S.Ct. 775, 31 L.Ed.2d 124; *Swarb* v. *Lennox*, 1972, 405 U.S. 191, 92 S.Ct. 767, 31 L.Ed.2d 138; *Sniadach* v. *Family Finance Corporation*, 1969, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349.

A sale under a deed of trust, to be an effective creditor remedy, must of course pass good title. The contract that provides for a power of sale thus relies, ultimately, on the state's acknowledgment of the legal effect of the involuntary change in ownership brought about by the exercise of the power of sale. That the state merely recognizes the legal effect of such private arrangements does not convert them into state acts for Fourteenth Amendment purposes. See *Black* v. *Cutter Laboratories*, 1955, 351 U.S. 292, 76 S.Ct. 824, 100 L.Ed. 1188. This principle is implicit in our UCC cases. It is explicit in the decisions of other circuits holding that a secured party, to enable it to sell an automobile repossessed through self-help, and permitting the sale to convey good title, does not significantly implicate the state in the termination of the debtor's property interest. See, e.g. *Shirley* v. *State National Bank of Connecticut*, 2 Cir. 1974, 493 F.2d 739, 743 n. 5; *Gibbs* v. *Titelman*, 3 Cir. 1974, 502

F.2d 1107. Virtually all formal private arrangements assume, at some point, the supportive role of the state. To hold that the state, by recognizing the legal effect of those arrangements, converts them into state acts for constitutional purposes would effectively erase to a significant extent the constitutional line between private and state action and subject to judicial scrutiny under the Fourteenth Amendment virtually all private arrangements that purport to have binding legal effect.

Here, by contrast, no state statute creates a right in mortgagees to proceed by non-judicial foreclosure; the right is created by contract. Moreover, the action taken by the appellee cannot be described as a function that has been traditionally the exclusive prerogative of the state.

Non-judicial foreclosure under a power of sale can certainly be characterized as a traditional remedy. Although it is not entirely clear when powers of sale first came into use in this country, they were sufficiently commonplace in 1774 to prompt New York to enact a statute to regulate their use. G. E. Osborne, Handbook on the Law of Mortgages, 726 (2d ed. 1970). In 1828 a New York Court described the power of sale as 'as ancient as the formation of the English government in this state.' *Slee* v. *President, et al. Manhattan Co.*, N.Y. 1828, 1 Paige 48, cited in Osborne at 729, n. 12. In Texas, non-judicial foreclosure under a power of sale in a deed of trust has been used and recognized for over one hundred years. *See*, for example, *Hipp* v. *Hutchett*, Tex. 1849, 4 Tex. 20, 25. Courts in the United States consistently recognized these powers of sale as valid and enforceable. Justice Field, speaking for the Supreme Court, held, in 1895:

> 'There is nothing in the law of mortgages, nor in the law that covers what are sometime designated as trust deeds in the nature of mortgages, which prevents the conferring by the grantor or mortgagor in such instrument of the power to sell the premises described therein upon default in payment of the debt secured by it, and, if the sale is conducted in accordance with the terms of the power, the title to the premises granted by way of security passes to the purchaser upon its consummation by a conveyance.'

Bell Silver & Copper Mining Co. v. *First National Bank*, 1895, 156 U.S. 470, 477, 15 S.Ct. 440, 443, 39 L.Ed. 497, 501. Somewhat later the Court noted that '[t]he validity of such a contractual power of sale is unquestionable.' *Scott* v. *Paisley*, 1926, 271 U.S. 632, 635, 46 S.Ct. 591, 592, 70 L.Ed. 1123, 1125. Professor Durfee could, in fact, find only a single instance of judicial nullification of a power of sale. Durfee, Cases Mortgages 355 n. 23, cited in Osborne at 726 n. 11.

Certainly, it cannot be said that termination of a debtor's equity of redemption was ever, in this country, the exclusive prerogative of the state. Foreclosure of the equity of redemption under contractual powers of sale have paralleled the foreclosure remedies provided by the courts. That the state has also involved itself in foreclosure practices, by providing first strict foreclosure and then later foreclosure by judicial sale, does not make the parallel private remedy state action. We agree with Judge Friendly in rejecting the notion that 'the state can constitutionally allow private persons to offer services parallel to those it offers or could offer only if it requires them to conform to

the same standards the Fourteenth Amendment imposes upon it.' The Dartmouth College Case and the Public-Private Penumbra at 24. The Supreme Court, in *Evans* v. *Newton*, expressly disavowed any such interpretation of its 'public function' holdings:

> 'The range of governmental activities is broad and varied, and the fact that the government has engaged in a particular activity does not necessarily mean that an individual entrepreneur or manager of the same kind of undertaking suffers the same constitutional inhibitions.' 382 U.S. 296, 300, 86 S.Ct. 486, 489, 15 L.Ed.2d 373.

Finally, as noted, this Court found no state action in self-help possession, even though self-help is clearly a remedy parallel and alternative to available judicial remedies.

* * *

> Indeed, self-help repossession, when measured against the transfer of title accomplished through non-judicial sale, strikes us as bearing more of the earmarks of the force the.exercise of which is traditionally confined to the sovereign, than does the transfer of title accomplished through a non-judicial foreclosure rule." 519 F.2d at 1170, 1172-73.

In *Bryant* v. *Jefferson Federal Savings and Loan Ass'n*, 509 F.2d 511 (D.C. Cir. 1974), the Court held that plaintiff's claim that the non-judicial foreclosure procedures of the District of Columbia were violative of the due process clause of the Fifth Amendment was "insubstantial" and did not require a three-judge court.

> The due process clause is a limitation on governmental, not private, action. *See, e.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172, 92 S.Ct. 1965, 32

L.Ed.2d 627 (1972); Shelley v. Kraemer, 334 U.S. 1, 13, 68 S.Ct. 836, 92 L.Ed. 1161 (1948). Thus, appellants must establish "significant government involvement" in order for the challenged action to fall within the ambit of the constitutional protection. *See* Moose Lodge v. Irvis, *supra*, 407 U.S. at 173, 92 S.Ct. 1965; Reitman v. Mulkey, 387 U.S. 369, 380, 87 S.Ct. 1627, 18 L.Ed.2d 830 (1967).

There is no significant governmental involvement in the mortgage foreclosure practices attacked here. The power of sale was created, not through governmental enactment, but by private consensual agreement. We recognized long ago that a deed of trust "provides the remedies for its own enforcement." 509 F.2d at 513.

In *Lawson* v. *Smith*, 402 F.Supp. 851 (N.D. Cal. 1975) plaintiffs sued to set aside a trustee's deed issued pursuant to a non-judicial foreclosure sale on the ground that the deed was void because the statutory provisions governing foreclosure sales in California are unconstitutional under the due process clause of both the Federal and State Constitutions. As in *Bryant* v. *Jefferson Federal Savings and Loan Ass'n, supra,* the Court found no governmental action and dismissed the case.

In *Global Industries* v. *Harris*, 376 F.Supp. 1379 (N.D. Ga. 1974) the Court held that the Georgia Statute regulating foreclosure sales under powers contained in security deeds did not provide the requisite state action on which to predicate a claim under the due process clause of the Fourteenth Amendment inasmuch as the creditor's power of sale was derived from the parties' contractual undertaking rather than from the Statute.

As Judge Wisdom noted in *Barrera, supra,* the case law developed under the self-help provisions of the Uniform Commercial Code overwhelmingly supports the conclusion that a creditor's remedy created by private contract and privately enforced is not susceptible of constitutional attack. *See, e.g.,* Shirley v. State National Bank of Connecticut, 493 F.2d 739 (2nd Cir.) *cert. denied* 419 U.S. 1009 (1974); Gibbs v. Titelman, 502 F.2d 1107 (3rd Cir. 1974); James v. Pinnix, 495 F.2d 206 (5th Cir. 1974) (no Civil Rights Act violation); Turner v. Impala Motors, 503 F.2d 607 (6th Cir. 1974); Bichel Optical Laboratories, Inc. v. Marquette National Bank of Minneapolis, 487 F.2d 906 (8th Cir. 1973); Adams v. Southern California First National Bank, 492 F.2d 324 (9th Cir.), *cert. denied* 419 U.S. 1006 (1974).

The decisions of the federal district courts and state courts upholding the constitutionality of self-help are legion. *See, e.g.,* Greene v. First National Exchange Bank of Virginia, 348 F.Supp. 672 (W.D. Va. 1972); Pease v. Havelock National Bank, 351 F.Supp. 118 (D. Neb. 1972); McCormick v. First National Bank of Miami, 322 F.Supp. 604 (S.D. Fla. 1971); Kinch v. Chrysler Credit Corp., 367 F.Supp. 436 (E.D. Tenn. 1973); Woods v. State of Tennessee, 378 F.Supp. 1364 (W.D. Tenn. 1974); Shelton v. General Electric Credit Corp., 359 F.Supp. 1079 (M.D. Ga. 1973).

The foreclosure proceeding in this case follows the pattern described in *Northrip* and *Barrera, supra.* The State of Tennessee and the Congress of the United States have no involvement in the foreclosure sale or transfer of title from the Trustee to a purchaser at the foreclosure sale. Appellants appear to argue that the application of Section 91 of the National Bank Act according to its plain meaning would render Section 91 violative of the due process clause of the Fifth Amendment. However, the

enactment and operation of Section 91 involves exactly the same governmental function at the federal level as the enactment of the self-help provisions found in Article 9, Section 503 of the Uniform Commercial Code by the various states. In neither instance is the nexus between governmental action and the act complained of sufficiently close to give rise to a governmental violation of due process.

III. 12 U.S.C. § 91 does not violate Respondents' constitutional guarantee of due process of law.

Even if the Court finds that Section 91 of the National Bank Act sufficiently draws the federal government into the foreclosure process to give rise to a colorable due process issue, the facts in this case show that there has been no violation of Respondents' right to due process.

A. A meaningful hearing is available.

Respondents argue that their inability to obtain a temporary injunction restraining the foreclosure sale by reason of Section 91 deprives them of a hearing. This is obviously erroneous. Nothing in Section 91 deprives mortgagors of a prejudgment hearing. Section 91 merely denies state courts the power to grant *certain types of remedies*.

Nothing in Section 91 prevents a mortgagor from filing a preforeclosure complaint seeking declaratory relief or obtaining a show cause hearing prior to the sale in which the Court could a) advise the mortgagee that it appears likely that a foreclosure sale, if conducted, would be set aside based on the showing made by mortgagors, and/or b) enter an order that the sale will be subject to the further orders of the Court. Under these circumstances, a national bank-mortgagee would be forced to proceed at its peril. In addition, any purchaser from the Trustee would take title subject to the sale's being set aside or deemed improper.

Secondly, immediately upon consummation of the sale the mortgagors could seek to set the sale aside. Since, under Tennessee law, the purchaser takes only such title as the Trustee owns, the property cannot be transferred to one having the rights of a bona fide purchaser. And, unlike the personalty in *Fuentes* v. *Shevin, supra,* real property stays put during the litigation. Moreover, under Tennessee law, the standard of proof for setting aside a foreclosure sale is identical to that required for preforeclosure injunctive relief. Held v. Tennessee Title Company, 223 Tenn. 545, 448 S.W.2d 413 (1969). Consequently, if a mortgagor were able to persuade the Court to enjoin the foreclosure in advance, he should have no difficulty persuading the Court to set aside the sale, and, presumably, to award damages for wrongful foreclosure.

Thus, although Section 91, by its terms, denies a particular type of remedy at a particular stage of the litigation—a temporary injunction—it does not deny mortgagors of a meaningful hearing or other types of relief that would adequately protect their property rights. Accordingly, the correct application of Section 91 does not violate the due process clause of the Fifth Amendment.

B. Respondents have waived any constitutional defenses.

Even if these Respondents once had a colorable due process argument, their failure to assert it earlier in these proceedings constitutes a waiver of that right.

> As this Court has noted, "even constitutional objections may be waived by a failure to raise them at a proper time. . . ." *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 143 (1967). "No procedural principle is more familiar to this Court than that a constitutional right may be forefeited in criminal as well as civil